DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1261
Vide 10-1218
Title: Credit Suisse Securities (USA) LLC, et al., Petitioners
v.
Vanessa Simmonds
Docketed: April 18, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (09-35262 (Lead))
Decision Date: December 2, 2010
Rehearing Denied: January 18, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Apr 15 2011	Petition for a writ of certiorari filed. (Response due May 18, 2011)
May 12 2011	Brief of respondent Vanessa Simmonds in opposition filed.
Jun 6 2011	Reply of petitioners Credit Suisse Securities (USA) LLC, et al. filed.
Jun 7 2011	DISTRIBUTED for Conference of June 23, 2011.
Jun 27 2011	Petition GRANTED. The Chief Justice took no part in the consideration or decision of this petition.
Aug 2 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 18, 2011.
Aug 2 2011	The time to file respondent's brief on the merits is extended to and including September 26, 2011.
Aug 12 2011	Joint letter from counsel for the parties proposing to lodge excerpts of a draft bill from a subcommittee of the U.S. House of Representatives.
Aug 18 2011	Joint appendix filed. (Statement of costs filed)
Aug 18 2011	Brief of petitioners Credit Suisse Securities (USA) LLC, et al. filed.
Aug 25 2011	Brief amicus curiae of the United States in support of neither party filed.
Aug 25 2011	Brief amici curiae of Chamber of Commerce of the United States of America, et al. filed.
Sep 12 2011	SET FOR ARGUMERNT ON Tuesday November 29, 2011.
Sep 19 2011	CIRCULATED
Sep 21 2011	Record received from U.S.C.A. for 9th Circuit. (1 box)
Sep 21 2011	Record from U.S.D.C. for District of Arizona is electronic and available on PACER.
Sep 26 2011	Brief of respondent Vanessa Simmonds filed. (Distributed)
Sep 29 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.

Oct 26 2011	Reply of petitioners Credit Suisse Securities (USA) LLC, et al. filed. (Distributed)
Oct 28 2011	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. The Chief Justice took no part in the consideration or decision of this motion.
Nov 29 2011	Argued. For petitioners: Christopher Landau, Washington, D. C. For United States, as amicus curiae: Jeffrey B. Wall, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent: Jeffrey I. Tilden, Seattle, Wash.
Mar 26 2012	Judgment VACATED and case REMANDED. Scalia, J., delivered the opinion of the Court, in which all other Members joined, except Roberts, C. J., who took no part in the consideration or decision of the case.

PETITION
FOR
WRIT OF
CERTIORARI

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BRIEFS

Supreme Court, U.S.
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No. OFFICE [illegible]

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

VANESSA SIMMONDS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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April 15, 2011

QUESTION PRESENTED

Whether the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is subject to tolling, and, if so, whether tolling continues even after the receipt of actual notice of the facts giving rise to the claim.

RULE 29.6 DISCLOSURE STATEMENT

Petitioner Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Citigroup Global Markets Inc. is a wholly owned subsidiary of Citigroup Financial Products Inc., which in turn is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc., which in turn is a wholly owned subsidiary of Citigroup, Inc., a publicly held corporation. No other publicly held company owns 10% or more of its stock.

Petitioner Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse (USA) Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse Group AG Guernsey Branch, which is a branch of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares, and (2) Credit Suisse AG, which itself is a wholly owned subsidiary of Credit Suisse Group AG and which has certain publicly registered securities. No publicly held company owns 10% or more of Credit Suisse Group AG.

Petitioner Deutsche Bank Securities Inc. is a jointly owned subsidiary of Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation. No other publicly held company owns 10% or more of its stock.

Petitioner Goldman, Sachs & Co. is an indirectly wholly-owned subsidiary of The Goldman Sachs Group, Inc. ("GS Group"), which is a corporation organized under the laws of Delaware and whose shares are publicly traded on the New York Stock Exchange. To the best of GS Group's knowledge, no publicly held company owns 10% or more of the common stock of GS Group.

Petitioner J.P. Morgan Securities Inc. is a wholly owned subsidiary of JPMorgan Chase & Co., a public company whose shares are traded on the New York Stock Exchange. J.P. Morgan Securities Inc. is the surviving entity in the October 1, 2008 merger between J.P. Morgan Securities Inc. and Bear, Stearns & Co Inc., a former U.S. broker-dealer subsidiary of The Bear Stearns Companies Inc. No other publicly held company owns 10% or more of J.P. Morgan Securities Inc.'s stock.

Petitioner Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc., which is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of Merrill Lynch & Co., Inc.

Petitioner Morgan Stanley & Co. Incorporated is a wholly owned subsidiary of Morgan Stanley, a publicly held corporation whose shares are traded on the New York Stock Exchange. No other publicly held company owns 10% or more of its stock.

Petitioner Robertson Stephens, Inc. (now merged into a new entity called Robertson Stephens Group, Inc.) is a wholly-owned subsidiary of Bank of America Corporation. No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

In this case, the Ninth Circuit held that the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), may be indefinitely tolled even *after* the receipt of actual notice of the facts giving rise to the claim. That holding squarely and concededly conflicts with the Second Circuit's rule that Section 16(b) tolling ends upon such notice. And, at an even broader level, both the Second and Ninth Circuits' tolling rules conflict with this Court's recognition that Section 16(b) establishes an absolute two-year period of repose that is not subject to tolling at all. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 n.5 (1991); *see also id.* at 375 (Kennedy, J., dissenting). The Court should grant this petition to resolve these conflicts, and thereby to ensure the uniform, clear, and consistent interpretation of this "important federal statute." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972).

Specifically, Section 16(b) bars a defined set of corporate insiders from profiting from a "short swing" purchase and sale of corporate securities within a six-month period, and allows a shareholder—after adequate demand on the corporate issuer of those securities—to bring a cause of action for disgorgement on the issuer's behalf. The statute specifies, however, that "no such suit shall be brought more than two years after the date such profit was realized." *Id.*

Relying on circuit precedent, the Ninth Circuit held below that Section 16(b)'s two-year time limit is tolled until the insider discloses the relevant purchase or sale of securities in a filing with the Securities and Exchange Commission (SEC) under Section 16(a), 15 U.S.C. § 78p(a), *regardless* of whether and when the issuer on whose behalf the Section 16(b) claim is brought or its shareholders had actual notice of the facts giving rise to the claim. *See* App. 61-66a (citing *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981)). The author of the Ninth Circuit's opinion, Judge Milan Smith, wrote a special concurring opinion acknowledging that this tolling rule conflicts with the Second Circuit's rule that tolling under Section 16(b) ends when the issuer on whose behalf the claim is brought or its shareholders receives actual notice of the underlying facts. *See* App. 75a (citing *Litzler v. CC Invs. L.D.C.*, 362 F.3d 203, 208 (2d Cir. 2004)). Because the issuers on whose behalf this case was brought and their shareholders had actual notice of the underlying facts for at least six years before this lawsuit was filed, these complaints would have been time-barred if brought in the Second Circuit. Certiorari is warranted based on that conflict alone.

And even putting aside the Second and Ninth Circuits' conflicting tolling rules, this petition merits review because both circuits erred by holding that Section 16(b)'s two-year time limit is subject to tolling at all. As this Court has recognized in construing companion provisions of the federal securities laws, the specific language that Congress used in Section 16(b)—"no such suit shall be brought" after a specified statutory time limit has elapsed—establishes an absolute outer limit on the time for suing, and thereafter gives defendants total repose. Thus, in his special concurrence below, Judge Smith noted that, but for the Ninth Circuit's binding decision in *Whittaker*, he would construe Section 16(b) in tandem with its companion provisions as a period of repose not subject to tolling.

Given the lenient venue rules governing Exchange Act claims, there is little reason for plaintiffs whose Section 16(b) claims would be time-barred absent tolling to file anywhere other than the Second or Ninth Circuits. Those two courts of appeals have thus established a *de facto* nationwide rule permitting tolling of Section 16(b)'s two-year time limit notwithstanding this Court's recognition that this time limit establishes a period of repose. If Section 16(b) tolling is to be the law of the land, it should be declared by this Court, not the lower courts, and certainly should not operate differently in different circuits. Accordingly, this Court's review is warranted.

OPINIONS BELOW

The Ninth Circuit's opinion, as amended by the order denying the petitions for rehearing *en banc*, is reported at __ F.3d __, 2011 WL 135693, and is reprinted in the Appendix to the Petition ("App.") at 1-75a. The district court's opinion is reported at 602 F. Supp. 2d 1202, and reprinted at App. 78-111a.

JURISDICTION

The Ninth Circuit entered judgment on December 2, 2011, and denied timely petitions for rehearing on January 18, 2011. App. 35a, 76-77a. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

The full text of Section 16 of the Securities Exchange Act of 1934, 15 U.S.C. § 78p, is reproduced in the Appendix. App. 112-15a.

STATEMENT OF THE CASE

1. In enacting the Securities Exchange Act of 1934, Congress "recognized that insiders may have access to information about their corporations not available to the rest of the investing public." *Foremost-McKesson, Inc. v. Provident Secs. Co.*, 423 U.S. 232, 243 (1976). Congress further recognized that, "[b]y trading on this information, these persons could reap profits at the expense of less well informed investors." *Id.* Congress responded to this problem in two ways.

a. Congress sought to prevent insiders from abusing their status by requiring them to disclose transactions involving securities in the relevant issuer. In particular, Section 16(a) of the Exchange Act requires "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of [a qualifying] equity security ..., or who is a director or an officer of the issuer of such security," to file a disclosure statement with the SEC under certain circumstances—when a covered person owns a security newly registered on a national exchange, when a person previously not covered by the section becomes covered, or when a covered person makes a purchase or sale of the security. 15 U.S.C. § 78p(a)(1), (2). The disclosure statement must set forth the amount of equity that the filer beneficially owns, and must be updated in the event of a change of ownership. *Id.* § 78p(a)(3). Congress believed that this "publicity requirement ...

would afford indirect protection against some potential misuses of inside information." *Foremost-McKesson*, 423 U.S. at 255-56.

b. While Congress enacted Section 16(a)'s disclosure requirement to afford "indirect protection" against misuse of inside information, *id.*, Congress also established more direct protection in Section 16(b) against one type of transaction that raised particular concerns: so-called "short-swing" trades, in which insiders buy and sell securities within a short period. "Prohibiting [such] short-swing trading by insiders with nonpublic information was an important part of Congress' plan in the 1934 Act to 'insure the maintenance of fair and honest markets.'" *Gollust v. Mendell*, 501 U.S. 115, 121 (1991) (quoting 15 U.S.C. § 78b). Congress enacted Section 16(b) "to eliminate such trading." *Id.*

That provision creates a "flat rule," *Reliance Elec.*, 404 U.S. at 422, prohibiting "any profit realized by [beneficial owners, directors, or officers] from any purchase and sale, or any sale and purchase, of any equity security of such issuer ... within any period of less than six months" from the time of the issuance of the security. 15 U.S.C. § 78p(b). Section 16(b) further authorizes a suit to recover profits from a prohibited transaction, either "by the issuer" or, alternatively, in an action "by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter." *Id.*

But Congress strictly circumscribed the time period for bringing a Section 16(b) action. In particular, Congress specified that "no such suit shall be brought more than two years after the date such profit was realized." *Id.* Accordingly, as this Court has explained, "Section 16(b) ... sets a 2-year ... period of repose." *Lampf,* 501 U.S. at 360 n.5 (1991); *see also id.* at 375 (Kennedy, J., dissenting) (describing the "2-year statute of repose for actions brought under § 16 of the 1934 Act").

Congress also authorized the SEC to exempt transactions that the agency concludes do not pose an "intolerably great" risk of being exploited by insiders. *Reliance Elec.,* 404 U.S. at 422; *see also Dreiling v. American Exp. Co.*, 458 F.3d 942, 950 (9th Cir. 2006). "[Section 16(b)] shall not be construed to cover ... any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U.S.C. § 78p(b). Pursuant to this statutory grant of authority, the SEC has established an "underwriting exemption" for "[a]ny purchase and sale, or sale and purchase, of a security that is made in connection with the distribution of a substantial block of securities" that is part of a good faith underwriting in the ordinary course of the underwriter's business. 17 C.F.R. § 240.16a-7(a); *see also* 17 C.F.R. § 240.16a-10 (extending underwriting exemption to Section 16(b) disgorgement liability).

2. a. This case involves Initial Public Offerings (IPOs) of equity securities that took place over a decade ago, during the stock market boom of 1998-2000. In 2001, after the bubble burst, over 1,000 lawsuits were filed against investment banks—including petitioners—alleging that they had engaged in "a vast scheme to defraud the investing

public" in the course of underwriting more than 300 IPOs. *In re Initial Pub. Offering Sec. Litig.* (*IPO*), 241 F. Supp. 2d 281, 293 (S.D.N.Y. 2003).

In particular, the *IPO* plaintiffs alleged that the investment banks artificially increased the price of the issuing companies' stock by requiring customers who received IPO allocations to purchase additional shares in the aftermarket at progressively higher prices (*i.e.*, "laddering"), and by issuing inflated research recommendations on issuers' stock. App. 83-84a; *IPO*, 241 F. Supp. 2d at 314-21. The *IPO* plaintiffs alleged that underwriters profited from this alleged scheme by requiring customers to pay them a portion of their profits (*i.e.*, kickbacks) and by obtaining additional investment banking opportunities. App. 84a; *IPO*, 241 F. Supp. 2d at 314-21. The parties to the *IPO* litigation eventually agreed to a settlement in 2009.

The IPOs at issue in the *IPO* litigation were also challenged under the antitrust laws. That lawsuit ultimately made its way to this Court, which held that the claims failed on the pleadings as a matter of law. *See Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264, 270-85 (2007). Justice Stevens, concurring in the judgment, noted that "[a]fter the initial purchase, the prices of newly issued stocks or bonds are determined by competition among the vast multitude of other securities traded in a free market," and dismissed as "frivolous" the suggestion "that an underwriting syndicate can restrain trade in that market by manipulating the terms of IPOs." *Id.* at 286 (opinion concurring in the judgment).

b. Respondent Vanessa Simmonds, a college student, is the daughter of "a securities lawyer with experience in Section 16(b) litigation." App. 82a, 107-08a. In 2007, respondent's father bought her stock in 54 companies that had conducted IPOs in 1999 and 2000. App. 107-08a. Each of these IPOs had been challenged in the *IPO* litigation. App. 83a.

Shortly after the purchase of these securities on her behalf, respondent filed 55 virtually identical complaints in the United States District Court for the Western District of Washington. (She subsequently voluntarily dismissed one of the complaints. App. 82a n.4.) Each complaint parroted the factual allegations of the *IPO* plaintiffs. App. 82-83a. The complaints alleged that petitioners—the investment bank(s) involved in each of the challenged IPOs—were covered security owners for purposes of Section 16(a)'s disclosure obligations because they had been a direct or indirect "beneficial owner" of more than 10% of the stock of the issuing company. Respondent contended that petitioners thus were required to disgorge to the issuing company any "short swing" profits made on the purchase or sale of such securities within a six-month period under Section 16(b), 15 U.S.C. § 78p(b).

3. The district court (Robart, J.) dismissed all 54 complaints. App. 78-111a. The court dismissed 30 of the complaints without prejudice based on respondent's failure to make an adequate demand on the issuing company before filing suit. App. 92-102a. (Those complaints are not at issue in this petition. *See infra* n.1.)

The district court dismissed the remaining 24 complaints—the complaints at issue here—as time-barred under the two-year time limit in Section 16(b). App. 103-10a. The court recognized that, under the Ninth Circuit's decision in *Whittaker*, "an insider's failure to disclose covered transactions in the required Section 16(a) reports tolls the two-year limitations period" until "the transactions are disclosed in the insider's Section 16(a) report." App. 105-06a (citing *Whittaker*, 639 F.2d at 527). The district court further recognized that *Whittaker* had "rejected the more lenient 'notification' approach which triggers the running of the two-year period once the corporation (and thus indirectly the shareholders) has sufficient information to put it on notice of its Section 16(b) claims." App. 106a (citing *Whittaker*, 639 F.2d at 529).

The district court, however, concluded that *Whittaker* does not control this case. "Here, unlike *Whittaker* and other cases employing the equitable tolling doctrine in Section 16(b) cases, there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the [issuing companies] for at least five years before these cases were filed." App. 107a; *see also id.* at 108a ("[T]he only significant development occurring within the last two years was [respondent's] acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed."). In the district court's view, it was inequitable to apply tolling here, given "the novelty of [respondent's] theory" that the underwriters were required to file Section 16(a) disclosures and the absence of "any end date of liability for the issuing companies or the underwriters." App. 110a. Indeed, the district court noted that "[respondent's] counsel acknowledged that under her theory she could buy stocks in companies who had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock." *Id.*

4. a. The Ninth Circuit reversed the district court's dismissal of 24 cases as time-barred.[1] App. 61-66a. The court of appeals rejected the district court's efforts to distinguish *Whittaker* on factual grounds, insisting that "the central holding of our opinion in *Whittaker*—both in our legal analysis and our application of the law to the facts of that case—is that the Section 16(b) statute of limitations is tolled until the [defendant] discloses his transactions in a Section 16(a) filing, *regardless* of whether the plaintiff knew or should have known of the conduct at issue." App. 63a (emphasis added); *see also* App. 65a ("[O]ur decision in *Whittaker* created a blanket rule that applies in *all* Section 16(b) actions.") (emphasis in original); App. 66a ("[T]he fundamental holding of *Whittaker* is that Section 16(b)'s two-year statute of limitations begins to run from the time that the defendant files a Section 16(a) disclosure

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[1] The court of appeals affirmed the district court's dismissal of the other 30 cases based on the inadequacy of respondent's demand, *see* App. 45-61a, and further held that those dismissals should have been with prejudice, *see* App. 66-70a. This petition concerns only the 24 cases in which the court of appeals reversed the district court's determination that the claims are time-barred. *See* App. 61-66a, 71a. None of these 24 cases has been the subject of a motion to dismiss based on the inadequacy of respondent's demand; indeed, the demand letters in these cases are not in the record. *See* App. 68-70a. Moreover, four of these cases involve non-Delaware issuers, in which the adequacy of respondent's demands will not be governed by Delaware law. App. 68-69a.

statement."). Indeed, the Ninth Circuit emphasized that *Whittaker* had *rejected* a "notice" approach "under which the time period is tolled until the Corporation ha[s] sufficient information to put it on notice of its potential § 16(b) claim." App. 62a (internal quotation omitted).

Under its "disclosure" approach, the Ninth Circuit acknowledged, a plaintiff could file a Section 16(b) claim "long after the corporation [is] on notice of the insider's trading." App. 63a. It is thus irrelevant that "much of the information described in the Complaints had been publicly disclosed in court filings, news reports, and the Issuing Companies' IPO registration filings" as early as 2001, six years before this lawsuit was filed. App. 64a. Rather, the Ninth Circuit held, Section 16(b)'s two-year time limit was never triggered because petitioners never filed a Section 16(a) disclosure statement. App. 62-66a.

b. Judge Milan Smith, who authored the panel's opinion, wrote a special concurrence. App. 72-75a. He identified "three alternatives" to the Ninth Circuit's "disclosure" approach, App. 75a: (i) "the statute of repose approach" not subject to tolling at all, *id.* (citing *Lampf*, 501 U.S. at 360 n.5); (ii) "the actual notice approach" adopted by the Second Circuit, *id.* (citing *Litzler*, 362 F.3d at 208); and (iii) a "hybrid approach" advocated by one judge on the Second Circuit, allowing for Section 16(b) tolling only "in cases of 'fraud or concealment,'" *id.* (citing *Litzler*, 362 F.3d at 208 n.5 (Jacobs, J., concurring)).

"Of these three approaches," Judge Smith reasoned, "the statutory text and statutory structure clearly point toward the repose approach." App. 75a.

Accordingly, "[w]ere it not for" *Whittaker*, he "would hold that Section 16(b) suits may not be brought more than two years after the short-swing trades take place," without any possibility of tolling. *Id.* That reading, he explained, was confirmed by this Court's decisions construing companion provisions of the federal securities laws with materially indistinguishable repose periods. App. 72-73a (discussing *Lampf*, 501 U.S. at 360-63, and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1797 (2010)). Judge Smith further explained that a "restrictive" time limit is "eminently logical" in this context: because "Section 16(b) imposes an inflexible penalty on corporate insiders even if they are not at fault and third parties are unharmed," it "makes no sense to allow individuals to be hauled into court years—or even decades—after they unintentionally violate Section 16." App. 73-74a.

Judge Smith therefore would have preferred to hold that no suit may be filed more than "two years after the insider's final profitable transaction, regardless of when—or even if—a Section 16(a) report is filed." App. 72a. Indeed, he "would have preferred to adopt *any one* of the three alternatives to *Whittaker*['s]" disclosure approach. App. 75a (emphasis added). But he ultimately "concur[red] with the panel's decision" because he believed himself "compelled to follow *Whittaker*." *Id.*

c. The court of appeals, over Judge Smith's objection on this issue, denied panel rehearing and rehearing *en banc*. App. 76-77a.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition because the Second and Ninth Circuits disagree on whether actual notice of the facts underlying a Section 16(b) claim should end tolling of that provision's two-year time limit. This Court should further grant review because *any* tolling of the two-year time limit conflicts with this Court's decisions characterizing Section 16(b)'s two-year time limit as a statute of repose. Indeed, unless this Court grants review, those two courts effectively will have established a nationwide rule under which "claim[s] that affect[] long-settled transactions might hang forever over honest persons." *Litzler*, 362 F.3d at 208 n.5 (Jacobs, J., concurring).

A. The Courts Of Appeals Are Divided Over Whether Actual Notice Of Facts Giving Rise To A Section 16(b) Claim Suspends Tolling Of The Two-Year Time Limit.

As Judge Smith recognized below, the courts of appeals are divided over whether Section 16(b)'s two-year time limit is tolled despite actual notice of the facts underlying the suit. The Ninth Circuit holds that the time limit is tolled unless and until the defendant files a Section 16(a) disclosure, even if actual notice existed years beforehand. The Second Circuit, in contrast, holds that actual notice ends tolling.

1. a. In *Whittaker*, the Ninth Circuit first considered whether Section 16(b)'s two-year time limit is subject to tolling and, if so, to what extent. The court acknowledged that "[t]he bare words" of the statute "do not say whether tolling is or is not allowed," and that "the legislative history ... is

silent" on this score. 639 F.2d at 527-28. Nonetheless, "examining the legislative purpose of § 16 as a whole and considering the place of the time provision in the overall legislative scheme," the court "infer[red] that tolling of the two year time period is required when the pertinent § 16(a) reports are not filed." *Id.* at 528. In particular, the court divined "a strong congressional intent to curb insider trading abuses," and "infer[red]" that tolling is necessary to prevent unscrupulous insiders from evading the disclosure requirements of Section 16(a). *Id.*

The court then addressed the question of when the tolling period should end. The court recognized that it could adopt either (1) "a 'notice' or 'discovery' interpretation under which the time period is tolled until the Corporation had sufficient information to put it on notice of its potential § 16(b) claim," or (2) a "'disclosure' interpretation under which the time period is tolled until the insider discloses the transactions at issue in his mandatory § 16(a) reports" *regardless* of whether the corporation was otherwise on notice of its claim. *Id.* at 527.

The court chose the latter interpretation, insisting that it was necessary to give full effect to the disclosure requirements of Section 16(a). *Id.* at 527-30. In particular, the court held "that an insider's failure to disclose covered transactions in the required § 16(a) reports tolls the two-year limitations period for suits under § 16(b)," and that "[t]he two-year period for § 16(b) begins to run when the transactions are disclosed in the insider's § 16(a) report." *Id.* at 530.

The Ninth Circuit thereby effectively rewrote the statute, transforming the filing deadline of two years after "the date [the challenged] profit was realized," 15 U.S.C. § 78p(b), into a filing deadline of two years after the date "the transactions are disclosed in the insider's § 16(a) report," *Whittaker*, 639 F.2d at 530. Although the *Whittaker* court characterized its rule as a form of "traditional equitable tolling," the rule does not take equitable considerations, such as whether the failure to file a Section 16(a) disclosure statement was "intentional or inadvertent," into account. *Id.* at 527 n.9. Rather, *Whittaker* established a bright-line rule: unless and until the defendant files a Section 16(a) disclosure statement, the two-year time limit in Section 16(b) is tolled. *Id.* at 527-30.

b. In sharp contrast to the Ninth Circuit in *Whittaker*, the Second Circuit in *Litzler* rejected the rule that tolling under Section 16(b) continues until the defendant files a disclosure statement under Section 16(a). Rather, the *Litzler* court adopted a "notice" approach, holding that "tolling should continue only until the claimant or (depending on the circumstances) the company gets actual notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing." 362 F.3d at 208.

Thus, the Second Circuit in *Litzler* remanded the case to allow the defendants (who concededly had not filed a Section 16(a) disclosure statement) to pursue a statute-of-limitations defense to a Section 16(b) claim. *See id.* at 204, 208-09. In particular, the court gave defendants the opportunity to prove that the issuer on whose behalf the Section 16(b) claim was brought had actual notice of the facts underlying the claim more than two years before it was brought.

See id. at 208 ("[T]olling would of course end on the date that [the issuer] received sufficient notice of a possible claim under Section 16(b).").

Judge Jacobs, the author of the majority opinion, explained in a separate footnote that he "would have preferred to say that the statute of limitations in Section 16(b) is equitably tolled only when the failure to file is intentional or unreasonable." *Id.* at 208 n.5. Such a rule, he reasoned, "would be consistent with the general principle that a federal statute of limitations may be equitably tolled when fraudulent or other conduct conceals the existence of a claim." *Id.* (quotation omitted). He expressed concern that "[o]ne possible effect of our holding ... is that a claim that affects long-settled transactions might hang forever over honest persons." *Id.* He thus "would prefer, absent such fraud or concealment, to preserve the operation of the statute of limitations in Section 16(b), which the Supreme Court has described in other contexts as a 'period of repose.'" *Id.* (quoting *Lampf*, 501 U.S. at 360 n.5).

c. The Ninth Circuit in this case reaffirmed its earlier decision in *Whittaker*, and refused to adopt the Second Circuit's "actual notice" standard. According to the Ninth Circuit, "the Section 16(b) statute of limitations is tolled *until the insider discloses his transactions in a Section 16(a)* filing, regardless of whether the plaintiff knew or should have known of the conduct at issue." App. 63a (emphasis added). Thus, the Ninth Circuit holds that actual notice is irrelevant to tolling, whereas (as noted above) the Second Circuit holds that actual notice is dispositive.

In his special concurrence, Judge Smith acknowledged that the Ninth Circuit's approach conflicts with the Second Circuit's "actual notice approach." App. 75a (citing *Litzler*, 362 F.3d at 208).[2] Judge Smith concluded that the Ninth Circuit was bound to follow its *Whittaker* precedent, but opined that "*Whittaker*'s cure is worse than the disease it intended to address," because that decision effectively creates "never-ending liability for corporate directors, officers, and shareholders" notwithstanding the statutory two-year time limit. App. 74-75a (M. Smith, J., specially concurring).

This case highlights the untoward consequences of the Ninth Circuit's rigid tolling rule. Petitioners vigorously dispute respondent's contention that they were required to file Section 16(a) disclosures in the first place, given that (among other things) the SEC has generally exempted underwriters from that requirement. *See* 17 C.F.R. §§ 240.16a-7(a), 240.16a-10; *see generally* 15 U.S.C. § 78p(b) ("This subsection shall not be construed to cover ... any transaction or transactions which the [SEC] by rules and regulations may exempt as not comprehended within the purpose of this subsection."). Under the Ninth Circuit's tolling rule, however, a person who does not file a Section 16(a) disclosure because he believes (correctly or incorrectly) that he is exempt from that provision can *never* invoke a timeliness defense to a

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[2] Judge Smith also recognized that the Ninth Circuit's approach differs from the "hybrid approach" proposed by Judge Jacobs, which would "toll[] the statute [only] in cases of 'fraud or concealment.'" App. 75a (citing *Litzler*, 208 n.5 (Jacobs, J., concurring)).

Section 16(b) claim. By embracing a tolling rule that turns solely on the defendant's actions rather than the plaintiff's knowledge, the Ninth Circuit has effectively stripped the very persons who may not be subject to Section 16 liability in the first place of a substantial Section 16 defense.

2. There can be no question that the result in this case would have been different under the Second Circuit's "actual notice" approach. The issuers here and their shareholders had actual notice of the facts underlying the Section 16(b) claims; indeed, as the district court explained, the issuers were co-defendants, along with petitioners, in the *IPO* litigation challenging the initial public offerings of the issuers' securities. *See* App. 85a ("[Respondent] filed her complaints for short-swing transactions based on *the same set of facts* as presented in *In re IPO*, albeit under a new theory of liability and almost six years later.") (emphasis added). Thus, "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners]" were necessarily known to the issuers and their shareholders "at least five years before these cases were filed." App. 107a. It is only because the Ninth Circuit applied its rigid *Whittaker* approach to tolling, rather than the Second Circuit's more flexible *Litzler* approach, that the Ninth Circuit rejected petitioners' timeliness defense as a matter of law. *See* App. 61-66a.

B. Tolling Of Section 16(b)'s Two-Year Time Limit Conflicts With This Court's Precedents.

Putting aside the need for resolution of the conflict between the Second and Ninth Circuits on whether actual notice suspends tolling of Section 16(b)'s two-year time limit, certiorari is also warranted because the decisions of *both* the Second and Ninth Circuits conflict with this Court's precedents. Under those precedents, the two-year time limit in Section 16(b) is a statute of repose not subject to tolling at all.

As Judge Smith noted in his special concurrence below, tolling is inconsistent with a "straightforward textual reading" of Section 16(b). App. 72a. Section 16(b) unequivocally states that "no ... suit shall be brought more than two years after the date [the prohibited "short-swing"] profit was realized." 15 U.S.C. § 78p(b). This Court has twice considered whether time limits in companion provisions of the federal securities laws allow for tolling. On both occasions, the Court held that the provisions created an absolute bar to actions brought beyond the statutory time limit.

In *Merck*, the relevant statute provided that suit "may be brought not later than the earlier of—(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." 28 U.S.C. § 1658(b). This Court held that "Congress' inclusion in the statute of an unqualified bar on actions instituted '5 years after such violation' ... giv[es] defendants *total repose* after five years." 130 S. Ct. at 1797 (emphasis added; quoting 28 U.S.C. § 1658(b)). Tolling therefore could not apply. *Id.*

In *Lampf,* this Court considered the operation of various time limits found in the federal securities laws, such as one stating that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation," 15 U.S.C. § 78i(e). The Court explained that the "3-year limit is a *period of repose inconsistent with tolling*. ... Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period." 501 U.S. at 363 (emphasis added).

To be sure, "[t]ime requirements in law-suits ... are customarily subject to 'equitable tolling.'" *Id.* at 363 (quoting *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990)). But "[i]t is important to distinguish statutes of limitations from statutes of repose." 4 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1056 (3d ed. 2010). "Although the commencement date for the applicable statute of limitations may be deferred and hinge upon the injured party's discovery of the existence of the cause of action, the point of commencement for the applicable statute of repose is commonly the date of the last act or omission that caused the plaintiff's injury." *Id.* And "a critical distinction is that a repose period is fixed and its expiration will not be delayed by estoppel or tolling." *Id.*

Like the time limits at issue in *Lampf* and *Merck*, Section 16(b) establishes a period of repose. As in *Lampf* and *Merck*, the time period begins to run when the violation occurs, *viz.*, "the date [the prohibited "short-swing"] profit was realized." 15 U.S.C. § 78p(b); *compare* 15 U.S.C. § 78i(e) (suit must be brought "within three years after such violation"); 28 U.S.C. § 1658(b) (suit may be brought "not later than ... 5 years after such violation"). Indeed, this Court in *Lampf* specifically equated

Section 16(b) with those provisions it held did not allow for tolling, stating that "Section 16(b) ... sets a 2-year rather than a 3-year *period of repose*." 501 U.S. at 360 n.5 (emphasis added); *see id.* at 375 (Kennedy, J., dissenting) (recognizing that Section 16(b) establishes "a 2-year statute of repose"). As Judge Smith observed, there is "little meaningful distinction" between the language of Section 16(b)'s two-year time limit and the relevant language of companion periods of repose. If Congress had wanted to subject the timeliness of a Section 16(b) lawsuit to the filing of a Section 16(a) disclosure, or the plaintiffs' discovery of some set of facts, it could and would have said so, as it did in other provisions of the federal securities laws. *See* 15 U.S.C. § 78i(e) ("No action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation."); 15 U.S.C. § 78r(c) (similar).

By contrast, a "restrictive" time limit is "eminently logical" in the context of Section 16(b). App. 73a (M. Smith, J., concurring). That provision, after all, establishes a "flat rule," *Reliance Elec.*, 404 U.S. at 422, that categorically bars insiders from any purchase or sale of an equity security within six months of issuance, *regardless* of whether they engage in any "unfair use of information." 15 U.S.C. § 78p(b); *see also Reliance Elec.*, 404 U.S. at 422 ("Section 16(b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation."); *Dreiling*, 458 F.3d at 947 ("[Section 16(b)] is over-inclusive in that it imposes strict liability regardless of motive, including trades not actually based on inside information."). Given the strict-liability nature of Section 16(b), there is no reason to construe that provision's time limit to leave the specter of liability hanging over potential defendants in perpetuity.

Unless this Court grants review and resolves whether the two-year time limit in Section 16(b) is subject to tolling, the tolling holdings of the Second and Ninth Circuits will become the *de facto* nationwide rule. Under the lenient venue rules governing Exchange Act suits, venue lies in any district where "any act or transaction constituting the violation occurred," or where "the defendant is found or is an inhabitant or transacts business." 15 U.S.C. § 78aa. Given that the "transaction constituting the violation" of Section 16(b) is an equity transaction, and every major national equity exchange is within the Second Circuit, as well as the expansive geographic scope of the Ninth Circuit, it is hard to imagine that Section 16(b) plaintiffs who wish to invoke tolling would file anywhere else. Indeed, nearly all reported decisions addressing Section 16(b) tolling arise in those two circuits. *See, e.g.*, *Dreiling v. America Online, Inc.*, No. C05-1339, 2005 WL 3299828, at *4 (W.D. Wash. Dec. 5, 2005); *Dreiling v. American Exp. Travel Related Servs. Co.*, 351 F. Supp. 2d 1077, 1082-83 (W.D. Wash. 2004), *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006); *Rosen ex rel. Egghead.Com, Inc. v. Brookhaven Capital Mgmt. Co.*, 179 F. Supp. 2d 330, 337-38 (S.D.N.Y. 2002); *Morales v. Executive Telecard, Ltd.*, No. 95 Civ. 10202, 1998 WL 314734, at *2-3 (S.D.N.Y. June 12, 1998).

Because the two circuits principally responsible for adjudicating Section 16(b) claims have both held that the two-year time limit in that provision is subject to tolling (albeit subject to different tolling rules), there is no reason for any plaintiff whose suit would be time-barred absent tolling to risk suing in any other circuit. It is thus especially important that this Court grant review and definitively resolve the threshold question whether Section 16(b) suits are subject to tolling at all, lest the Second and Ninth Circuits effectively resolve that important legal question for the Nation by default.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

April 15, 2011

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APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE SECURITIES (USA) LLC; JPMORGAN CHASE & CO., a Delaware corporation, successor in interest to Hambrecht & Quist and Chase Securities Inc.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ONVIA INC., a Delaware corporation formerly known as Onvia.com Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC.,
Defendants-Appellees.

In Re: SECTION 16(b) LITIGATION

No. 09-35262
D.C. No. 2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
DEUTSCHE BANK SECURITIES INC.; **FOUNDRY NETWORKS** INC., **Nominal Defendant, a Delaware corporation;** MERRILL **LYNCH PIERCE FENNER &** SMITH **INCORPORATED; J.P.** MORGAN SECURITIES INC.,
Defendants-Appellees.
IN RE: SECTION 16(B) LITIGATION

No. 09-35280
D.C. Nos.
2:07-cv-01566-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MERRILL LYNCH & CO. INC.,
Defendant,
and
FINISAR CORPORATION, Nominal Defendant, **a Delaware corporation; MERRILL** LYNCH **PIERCE FENNER & SMITH INCORPORATED; J.P.** MORGAN SECURITIES INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35282
D.C. Nos.
2:07-cv-01567-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO., INCORPORATED; LEHMAN BROTHERS, INC.; BANK OF AMERICA CORPORATION; ROBERTSON STEPHENS, INC.; AVANEX CORPORATION,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35285
D.C. Nos.
2:07-cv-01568-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland formerly known as Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; TIVO INC., Nominal Defendant, a Delaware corporation; ROBERTSON STEPHENS, INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35286
D.C. Nos
2:07-cv-01576-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS & CO., a New York limited partnership; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS INC., a Massachusetts corporation,
Defendants-Appellees,
and
TURNSTONE SYSTEMS, INC. a Delaware corporation,
Defendant.
In Re: SECTION 16(b) LITIGATION

No. 09-35288
D.C. Nos.
2:07-cv-01569-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO., "Goldman Sachs"; CREDIT SUISSE SECURITIES (USA) LLC, "Credit Suisse" formerly known as Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; JUNIPER NETWORKS INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35289 D.C. Nos. 2:07-cv-01577-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO.,
INCORPORATED; DEUTSCHE BANK
SECURITIES, INC.; MERRILL
LYNCH,
PIERCE, FENNER & SMITH
INCORPORATED; ARIBA INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35290
D.C. Nos.
2:07-cv-01570-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO.,
INCORPORATED; CITIGROUP
GLOBAL
MARKET, INC.; AKAMAI
TECHNOLOGIES, INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35292
D.C. Nos.
2:07-cv-01571-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS GROUP INC., a Delaware corporation; JPMORGAN CHASE & CO., a Delaware corporation, successor in interest to Hambrecht & Quist LLC, *Defendants,* and KANA SOFTWARE INC., Nominal Defendant, a Delaware corporation formerly known as Kana Communications Inc.; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35293 D.C. Nos. 2:07-cv-01578-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY, a Delaware corporation, successor in interest to Morgan Stanley Dean Witter,
Defendants,
and
SILICON LABORATORIES, INC., Nominal Defendant, a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; LEHMAN BROTHERS INC.; CITIGROUP GLOBAL MARKETS, INC.,
Defendants-Appellees.

JAMES W. GIDDENS, TRUSTEE FOR THE LIQUIDATION OF THE BUSINESS OF LEHMAN BROTHERS INC.,
Trustee-Appellee.

In Re: SECTION 16(b) LITIGATION

No. 09-35297
D.C. Nos.
2:07-cv-01590-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS GROUP INC., a Delaware corporation,
Defendants,
and
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; PALM INC., a Nominal Defendant, a Delaware corporation; GOLDMAN SACHS & CO.; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; ROBERTSON STEPHENS, INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35300
D.C. Nos.
2:07-cv-01593-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS GROUP INC.,
Defendants,
and
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; MAXYGEN INC., Nominal Defendant, a Delaware corporation; GOLDMAN SACHS & CO.,; ROBERTSON STEPHENS, INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35301
D.C. Nos.
2:07-cv-01594-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland FKA Credit Suisse First Boston Corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; SILICON IMAGE, INC., Nominal Defendant, a Delaware corporation; ROBERTSON STEPHENS, INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35302
D.C. No.
2:07-cv-01575-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS GROUP INC., a Delaware corporation,
Defendant,
and
STREET.COM INC.; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35303
D.C. Nos.
2:07-cv-01595-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; CRITICAL PATH, INC., Nominal Defendant, a California corporation; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES, INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35306
D.C. No.
2:07-cv-01582-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; CONCUR TECHNOLOGIES, INC., a Delaware corporation; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES, INC.,
Defendants-Appellees.

In Re: SECTION 16(b) LITIGATION

No. 09-35307
D.C. Nos.
2:07-cv-01585-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; SOURCEFORGE, INC., Nominal Defendant, a Delaware corporation, FKA VA Linux Systems, Inc.; LEHMAN BROTHERS, INC.,
Defendants-Appellees,

JAMES W. GIDDENS, Trustee for the Liquidation of the Business of Lehman Brothers, Inc.,
Trustee-Appellee.

In Re: SECTION 16(b) LITIGATION

No. 09-35308
D.C. No.
2:07-cv-01583-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES, INC.; RED HAT, INC., a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35309
D.C. Nos.
2:07-cv-01587-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; SELECTICA, INC., Nominal Defendant, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35310
D.C. No.
2:07-cv-01584-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC., a Massachusetts corporation,
Defendants-Appellees,
and
INTERWOVEN, INC.,
Defendant.
In Re: SECTION 16(b) LITIGATION

No. 09-35312
D.C. Nos.
2:07-cv-01579-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO., INCORPORATED; J.P. MORGAN SECURITIES, INC.; VIGNETTE CORPORATION, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35313
D.C. Nos.
2:07-cv-01588-JLR
2:07-cv-01549-JLR

Vanessa Simmonds, *Plaintiff-Appellant*, v. Morgan Stanley & Co., Incorporated; J.P. Morgan Securities, Inc.; Lehman Brothers, Inc.; Sycamore Networks, Inc., a Delaware corporation, *Defendants-Appellees*. *In Re: Section 16(b) Litigation*	No. 09-35314 D.C. Nos. 2:07-cv-01589-JLR 2:07-cv-01549-JLR
Vanessa Simmonds, *Plaintiff-Appellant*, v. Credit Suisse Group Securities (USA) LLC, a Delaware limited liability company; Bank of America Corporation, a Delaware corporation; Robertson Stephens, Inc.; J.P. Morgan Securities Inc., a Delaware corporation, *Defendants-Appellees*, and Openwave Systems, Inc., a California corporation, *Defendant*. *In Re: Section 16(b) Litigation*	No. 09-35315 D.C. No. 2:07-cv-01580-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC.
Defendants-Appellees,
and
INFORMATICA CORPORATION, a Delaware corporation,
Defendant.
In Re: SECTION 16(b) LITIGATION

No. 09-35316
D.C. Nos.
2:07-cv-01581-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP SECURITIES (USA) LLC, a Delaware limited liability company; BANK OF AMERICA CORPORATION, a Delaware corporation; ROBERTSON STEPHENS, INC., a Massachusetts corporation; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED, a Delaware corporation; CITIGROUP GLOBAL MARKETS INC., a New York corporation,
Defendants-Appellees,
and
INTERSIL CORPORATION, a Delaware corporation,
Defendant.
In Re: SECTION 16(b) LITIGATION

No. 09-35317
D.C. Nos.
2:07-cv-01572-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS GROUP INC.,
Defendant,
and
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson; Stephens, Inc.; SONUS NETWORKS INC., a Delaware corporation; GOLDMAN SACHS & CO.; LEHMAN BROTHERS INC.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC.,
Defendants-Appellees,
JAMES W. GIDDENS,
TRUSTEE FOR THE
LIQUIDATION OF THE BUSINESS OF
LEHMAN BROTHERS INC.
Trustee-Appellee.
In Re: SECTION 16(b) LITIGATION

No. 09-35318
D.C. Nos.
2:07-cv-01597-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY & CO., INCORPORATED; J.P. MORGAN SECURITIES, INC., a Delaware corporation; LEHMAN BROTHERS, INC., a Delaware corporation, *Defendants-Appellees,* and AVICI SYSTEMS, INC., a Delaware corporation, *Defendant.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35320 D.C. No. 2:07-cv-01573-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; PRICELINE.COM INC., a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; ROBERTSON STEPHENS, INC.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35321
D.C. Nos.
2:07-cv-01598-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS & CO.,; LEHMAN BROTHERS, INC.; J.P. MORGAN SECURITIES, INC.; MARVELL TECHNOLOGY GROUP, LTD., a Bermuda corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35322
D.C. Nos.
2:07-cv-01632-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO., INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; PEROT SYSTEMS CORPORATION, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35323
D.C. Nos.
2:07-cv-01631-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; DEUTSCHE BANK AG, a global bank headquartered in Frankfurt, German; LEHMAN BROTHERS HOLDINGS, INC., a Delaware corporation; AIRSPAN NETWORKS, INC., Nominal Defendant, a Washington corporation; DEUTSCHE BANK SECURITIES, INC.; LEHMAN BROTHERS, INC.,
Defendants-Appellees,
and
JAMES W. GIDDENS, Trustee for the Liquidation of the Business of Lehman Brothers, Inc.,
Trustee-Appellee.
In Re: SECTION 16(b) LITIGATION

No. 09-35324
D.C. No.
2:07-cv-01638-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
GOLDMAN SACHS & CO.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest BancBoston Robertson Stephens Inc.; ROBERTSON STEPHENS, INC.; INSWEB CORPORATION, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No-09-35325
D.C. Nos.
2:07-cv-01630-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO., INCORPORATED; DEUTSCHE BANK SECURITIES, INC.; ASIAINFO HOLDINGS, INC., a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35326
D.C. Nos.
2:07-cv-01633-JLR
2:07-cv-01549-JLR

Vanessa Simmonds,
Plaintiff-Appellant,
v.
Bank of America Corporation, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc. and FleetBoston Robertson Stephens, Inc.; Robertson Stephens, Inc.; J.P.Morgan Securities, Inc.; Keynote Systems, Inc., a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35328
D.C. Nos.
2:07-cv-01634-JLR
2:07-cv-01549-JLR

Vanessa Simmonds,
Plaintiff-Appellant,
v.
Bank of America Corporation, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; Robertson Stephens, Inc.; J.P. Morgan Securities Inc.; Digimarc Corporation, Nominal Defendant, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35327
D.C. No.
2:07-cv-01652-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. GOLDMAN SACHS & CO.; BEAR STEARNS & CO., INC.; DEUTSCHE BANK SECURITIES, INC.; TIBCO SOFTWARE, INC., a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35331 D.C. Nos. 2:07-cv-01635-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MARTHA STEWART LIVING OMNIMEDIA INC., a Delaware corporation; MORGAN STANLEY & CO. INCORPORATED; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35333 D.C. Nos. 2:07-cv-01605-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. CREDIT SUISSE GROUP, a global bank headquartered in Zurich, Switzerland; AUDIBLE INC., a Delaware corporation; J.P. MORGAN SECURITIES INC., *Defendants-Appellees*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35334 D.C. Nos. 2:07-cv-01623-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant*, v. GOLDMAN SACHS & CO., a New York limited partnership; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED, a Delaware corporation; BANK OF AMERICA CORPORATION, a Delaware corporation, ROBERTSON STEPHENS, INC., a Massachusetts corporation, *Defendants-Appellees*, and SABA SOFTWARE, INC., a Delaware corporation, *Defendant*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35335 D.C. Nos. 2:07-cv-01637-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; DEUTSCHE BANK SECURITIES INC., a Delaware corporation; CITIGROUP GLOBAL MARKETS, INC., a New York corporation,
Defendants-Appellees,
and
TRANSMETA CORPORATION, a Delaware corporation,
Defendant.
In Re: SECTION 16(b) LITIGATION

No. 09-35337
D.C. Nos.
2:07-cv-01636-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CAPTSONE TURBINE CORPORATION, a Delaware corporation; GOLDMAN SACHS & CO.; MERRILL LYNCH PIERCE FENNER & SMITH INCORPORATED; MORGAN STANLEY & CO. INCORPORATED,
Defendants-Appellees,
In Re: SECTION 16(b) LITIGATION

No. 09-35339
D.C. Nos.
2:07-cv-01624-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO. INCORPORATED; BROCADE COMMUNICATIONS SYSTEMS, INC., a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35344
D.C. Nos.
2:07-cv-01626-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Robertson Stephens, Inc.; J.P. MORGAN SECURITIES INC.; ROBERTSON STEPHENS, INC.; OPLINK COMMUNICATIONS, INC., a Delaware corporation,
Defendants-Appellees.

In Re: SECTION 16(b) LITIGATION

No. 09-35345
D.C. Nos.
2:07-cv-01667-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; J.P. MORGAN SECURITIES INC.; NAVASITE, INC., a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35346
D.C. No.
2:07-cv-01666-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; DEUTSCHE BANK SECURITIES, INC., a Delaware corporation; ASPECT MEDICAL SYSTEMS, INC., Nominal Defendant, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35347
D.C. No.
2:07-cv-01655-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,

v.

BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; BEAR STEARNS & CO., INC.; PACKETEER, INC., Nominal Defendant, a Delaware corporation,
Defendants-Appellees.

In Re: SECTION 16(b) LITIGATION

No. 09-35348
D.C. No.
2:07-cv-01654-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,

v.

BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; OMNIVISION TECHNOLOGIES, INC., a Delaware corporation,
Defendants-Appellees.

In Re: SECTION 16(b) LITIGATION

No. 09-35349
D.C. Nos.
2:07-cv-01668-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
CREDIT SUISSE SECURITIES (USA), LLC; OCCAM NETWORKS, INC., a Delaware corporation, FKA Accelerated Networks, Inc.,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35350
D.C. Nos.
2:07-cv-01669-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS,
Plaintiff-Appellant,
v.
J.P. MORGAN SECURITIES INC.; BEAR STEARNS & CO., INC.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC.; IMMERSION CORPORATION, a Delaware corporation,
Defendants-Appellees.
In Re: SECTION 16(b) LITIGATION

No. 09-35351
D.C. Nos.
2:07-cv-01670-JLR
2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MORGAN STANLEY & CO. INCORPORATED, a Delaware corporation; CREDIT SUISSE SECURITIES (USA), LLC; J.P. MORGAN SECURITIES, INC.; INTERNAP NETWORK SERVICES CORPORATION, Nominal Defendant, a Delaware corporation, *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35352 D.C. No. 2:07-cv-01653-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. MICROTUNE INC., a Delaware corporation; GOLDMAN SACHS & CO.; J.P. MORGAN SECURITIES INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35355 D.C. No. 2:07-cv-01627-JLR

VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to BancBoston Robertson Stephens, Inc.,; MORGAN STANLEY & CO. INCORPORATED; ROBERTSON STEPHENS, INC.; EXTREME NETWORKS INC., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35357 D.C. No. 2:07-cv-01628-JLR 2:07-cv-01549-JLR
VANESSA SIMMONDS, *Plaintiff-Appellant,* v. BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to Robertson Stephens, Inc.; J.P. MORGAN SECURITIES INC.; ROBERTSON STEPHENS, INC.; COSINE COMMUNICATIONS INC., a Delaware corporation; GOLDMAN SACHS & CO., *Defendants-Appellees.* *In Re: SECTION 16(b) LITIGATION*	No. 09-35358 D.C. Nos. 2:07-cv-01629-JLR 2:07-cv-01549-JLR

VANESSA SIMMONDS, *Plaintiff-Appellee*, v. CREDIT SUISSE SECURITIES (USA) LLC; CREDIT SUISSE SECURITIES (USA) LLC; J.P. MORGAN SECURITIES INC.; BANK OF AMERICA CORPORATION, a Delaware corporation, successor in interest to FleetBoston Robertson Stephens, Inc.; ROBERTSON STEPHENS, INC., *Defendants-Appellants*. *In Re: SECTION 16(b) LITIGATION*	No. 09-35363 D.C. Nos. 2:07-cv-01549-JLR 2:07-cv-01549-JLR ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Western District of Washington
James L. Robart, District Judge, Presiding

Argued and Submitted October 5, 2010
Seattle, Washington

Filed December 2, 2010
Amended January 18, 2011

Before: Sidney R. Thomas and Milan D. Smith, Jr., Circuit Judges, and Michael R. Hogan, District Judge.*

Opinion by Judge Milan D. Smith, Jr.;
Concurrence by Judge Milan D. Smith, Jr.

COUNSEL

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* The Honorable Michael R. Hogan, United States District Judge for the District of Oregon, sitting by designation.

O'Melveny & Myers LLP, New York, New York; Robert B. McCaw, Wilmer Cutler Pickering Hale and Dorr LLP, New York, New York, for the defendants-appellees-cross-appellants.

OPINION

M. SMITH, Circuit Judge:

Plaintiff-Appellant Vanessa Simmonds appeals the district court's dismissal of fifty-four related derivative complaints brought under Section 16(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78p(b). Simmonds's complaints allege that the Defendant-Appellee investment banks (collectively, Underwriters) violated Section 16(b) by engaging in prohibited "short-swing" transactions in connection with the Initial Public Offerings (IPOs) of the fifty-four Defendant-Appellee corporations (collectively, Issuing Companies) between 1999 and 2000. Simmonds seeks disgorgement of the Underwriters' alleged short-swing trading profits.

We affirm the district court's conclusion (rendered in the thirty cases in which the issue was raised) that Simmonds failed to present an adequate demand letter to the Issuing Companies prior to filing her lawsuits, and we remand these cases to the district court to dismiss the complaints with prejudice. We reverse the district court's conclusion that the remaining twenty-four cases are barred by Section 16(b)'s two-year statute of limitations, and we remand these cases to the district court so that all defendants, including the Underwriters, have a full opportunity to contest the adequacy of Simmonds's demand letters with respect to the remaining twenty four cases.

FACTUAL AND PROCEDURAL BACKGROUND

In her First Amended Complaints (Complaints), Simmonds alleges that while the Underwriters were acting as lead underwriters on the Issuing Companies' IPOs, they coordinated their activities with the Issuing Companies' officers, directors, and principal shareholders (collectively, Insiders) in order to obtain financial benefits from post-IPO increases in the Issuing Companies' stock prices.[1] Simmonds alleges that the Insiders entered "lock-up agreements" with the Underwriters that prevented the Insiders from offering or selling their stock for 180 days following the IPO. The purpose of the lock-up agreements was to "collectively hold[ ] ... and refrain[ ] from selling" the Insiders' shares, and the Underwriters and Insiders intended to receive financial benefits by selling these shares into an inflated market after the lock-up agreements expired. In order to create this inflated market, the Underwriters and Insiders allegedly agreed to release the IPO to the general public at a discount to the price that "they knew to be the likely aftermarket price range ... based on clear indications of IPO and aftermarket demand." The Underwriters also allegedly inflated the post-IPO share prices by engaging in a practice known as "laddering"—in exchange for giving their customers access to IPO allocations, the Underwriters required their customers (including the Issuing Companies' Insiders) to purchase shares "at progressively higher prices" following the IPO.[2] Finally, Simmonds asserts that the Underwriters engaged in "improper research-related activities that were designed to inflate the market price" of the shares.[3]

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[1] The appeals have been stayed as to Defendant Lehman Brothers, Inc. pending resolution of its bankruptcy proceedings.

According to Simmonds, these allegations establish that the Underwriters and Insiders acted as a group and coordinated their conduct with respect to acquiring the Issuing Companies' stock, holding the stock, and disposing of the stock "so as to share in the profits gained in the aftermarket following the IPO."

Simmonds alleges that the Underwriters had three types of "direct or indirect pecuniary interest[s]" in the Issuing Companies' stock that allowed the Underwriters to "profit[ ] from purchases and sales, or sales and purchases" of that stock. (The Complaints define these transactions as the operative "Short-Swing Transactions" for purposes of these lawsuits.) First, the Underwriters "shar[ed] in the profits of customers to whom they made IPO allocations" of the Issuing Companies' stock. Second, the Underwriters "allocat[ed] shares of [the Issuing Companies'] stock to executives and other high-level insiders of other companies, both private and public, from which [the Underwriters] expected to receive new or additional investment banking business in return." Finally, the Underwriters "creat[ed] the opportunity for other members of the [g]roup to derive personal financial benefits from the sale of the [the Issuing Companies'] stock into an inflated market, in an effort by [the Underwriters] to obtain future investment banking business from [the Issuing Companies]."[4]

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[2] "Laddering ... is a practice that involves requiring IPO purchasers to commit to purchase additional shares in the after-market. Laddering not only provides improper consideration for the allocation of IPO shares, but also creates additional demand in the aftermarket, designed to insure rising prices once the shares are publicly traded." 2 Thomas Lee Hazen, *Law of Securities Regulation* § 6.0 (6th ed. Supp. 2010) (hereinafter Hazen).

[3] Some of the Complaints include specific factual details regarding the Underwriters' publication of favorable ratings on the Issuing Companies' stock. In addition, some of the Complaints describe the Underwriters' participation in secondary stock offerings.

In her Complaints, Simmonds seeks to compel the Underwriters to disgorge the profits they received from these "Short-Swing Transactions." Simmonds alleges that prior to filing the Complaints, she submitted demand letters insisting that the Issuing Companies seek this relief directly (as is their right under Section 16(b)). When more than sixty days had lapsed after she sent the demand letters, Simmonds filed the Complaints at issue in this appeal.

The Underwriters jointly filed a motion to dismiss Simmonds's Complaints under Fed. R. Civ. P. 12(b)(6). The Underwriters contended that

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[4] The final two activities are commonly known as "spinning," which is "[t]he giving of shares or preferred opportunities to buy shares in an initial public offering to key investment-banking clients in order to solicit or retain profitable business in the future." *Black's Law Dictionary* 1531 (9th ed. 2009).

Simmonds's claims were time-barred, that Simmonds's Complaints failed to state a cause of action under Section 16(b), and that the Underwriters are protected by various exemptions from Section 16(b). Thirty of the Issuing Companies (collectively, Moving Issuers) filed a separate motion to dismiss under Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6).[5] The Moving Issuers argued that Simmonds's claims were time-barred and that Simmonds lacked standing because she failed to submit adequate demand letters to the Issuing Companies prior to filing suit.

The district court granted the Moving Issuers' Fed. R. Civ. P. 12(b)(1) motions to dismiss based on the inadequacy of Simmonds's demand letters, and granted the Underwriters' Fed. R. Civ. P. 12(b)(6) motions to dismiss based on the two-year statute of limitations. *In re Section 16(b) Litig.*, 602 F. Supp. 2d 1202, 1211-18 (W.D. Wash. 2009). The court did not address the Underwriters' remaining arguments regarding the merits of Simmonds's allegations and the scope of the Underwriters' exemptions from Section 16(b). *See id.* at 1205, 1219. The court dismissed without prejudice the thirty actions resolved by the Moving Issuers' Fed. R. Civ. P. 12(b)(1) motions. *Id.* at 1218. The court dismissed the remaining twenty-four cases with prejudice in light of its ruling on the statute of limitations. *Id.*

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[5] The Moving Issuers—all of which are Delaware corporations—are Akamai Technologies, Inc.; Ariba, Inc.; AsiaInfo Holdings, Inc.; Aspect Medical Systems, Inc.; Audible, Inc.; Avici Systems, Inc. (now named Soapstone Networks, Inc.); Capstone Turbine Corporation; Cosine Communications, Inc.; Digimarc Corporation; Finisar Corporation; ~~Digimarc Corporation;~~ Internap Networks Service Corporation; Intersil Corporation; Martha Stewart Living Omnimedia, Inc.; Maxygen, Inc.; NaviSite Inc.; Occam Networks, Inc.; Onvia, Inc.; ~~Openwave Systems Inc.;~~ Oplink Communication, Inc.; Packeteer Inc.; Perot Systems Corporation; Priceline.com, Inc.; RedHat, Inc.; Saba Software, Inc.; Selectica, Inc.; Silicon Laboratories, Inc.; Sonus Networks, Inc.; Sycamore Networks, Inc.; TheStreet.com, Inc.; TiVo, Inc.; and Vignette Corporation.

Simmonds filed a timely appeal, and the thirty Moving Issuers filed timely cross-appeals requesting that the district court's dismissals of their cases be entered with prejudice rather than without prejudice. We granted the parties' joint motion to consolidate the cases on appeal pursuant to Fed. R. App. P. 3(b)(2).

JURISDICTION AND STANDARD OF REVIEW

Ordinarily, "[a] dismissal of a complaint without prejudice is not a final order." *Martinez v. Gomez*, 137 F.3d 1124, 1125 (9th Cir. 1998). However, the district court's orders in these cases are final and appealable because "leave to amend was not specifically allowed and [Simmonds] cannot amend [her] complaint to defeat the statute of limitations bar" as construed by the district court. *Id.* at 1125-26. Accordingly, we have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's dismissal for failure to comply with the demand requirement for abuse of discretion. *Potter v. Hughes*, 546 F.3d 1051, 1056, 1058 (9th Cir. 2008).[6] We review the district court's dismissal on statute of limitations grounds de novo. *Lukovsky v. City & Cnty. of S.F.*, 535 F.3d 1044, 1047 (9th Cir. 2008). We refrain from reviewing issues not addressed by the district court. *Golden Gate Hotel Ass'n v. City & Cnty. of S.F.*, 18 F.3d 1482, 1487 (9th Cir. 1994) ("As a general rule, a federal appellate court does not consider an issue not passed upon below." (internal quotation marks omitted)).

DISCUSSION

[1] "Congress enacted Section 16(b) as part of the Exchange Act to prevent corporate insiders from exploiting their access to information not generally available to others." *Dreiling v. Am. Online Inc.*, 578 F.3d 995, 1001 (9th Cir. 2009) (internal quotation marks and alterations omitted). Section 16(b) requires corporate insiders to disgorge any trading profits they obtain in any "short-swing" transaction, which is defined as "a coupled purchase-and-sale, or sale-and purchase, completed within six months." *Dreiling v. Am. Express Co.*, 458 F.3d 942, 947 (9th

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[6] The Moving Issuers challenged Simmonds's compliance with the demand requirement in a motion to dismiss for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). The demand requirement is an element of prudential statutory standing rather than constitutional Article III standing. *Potter*, 546 F.3d at 1055-56. While Article III standing may be raised in a Fed. R. Civ. P. 12(b)(1) motion, questions of statutory standing must be raised in a Fed. R. Civ. P. 12(b)(6) motion. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174-75 (9th Cir. 2004). We construe the Moving Issuers' Fed. R. Civ. P. 12(b)(1) motion as a Fed. R. Civ. P. 12(b)(6) motion. *See, e.g., Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1206 n.2 (9th Cir. 1995).

Cir. 2006) (citing 15 U.S.C. § 78p(b)). There are four basic elements of a Section 16(b) claim: "(1) a purchase and (2) a sale of securities (3) by an officer or director of the issuer or by a shareholder who owns more than ten percent of any one class of the issuer's securities (4) within a six-month period." *Gwozdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998).

The purpose of the rule is not to punish specific instances of wrongdoing or remedy harms suffered by particular individuals. Rather, the law is "aimed at protecting the public" by preventing corporate insiders from exploiting inside information at the expense of ordinary investors. *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 592 (1973). In order to fulfill this purpose, Section 16(b) "is a blunt instrument, at once both over- and under-inclusive." *Dreiling v. Am. Express*, 458 F.3d at 947. It "is over-inclusive in that it imposes strict liability regardless of motive, including trades not actually based on inside information," and "[i]t is under-inclusive in that there is no liability for trades made on inside information if more than six months transpire between purchase and sale." *Id.*

This appeal focuses on a pair of procedural prerequisites to filing a Section 16(b) lawsuit: the demand requirement, and the statute of limitations. Shareholders may only file a Section 16(b) suit after requesting that the issuing company take appropriate action against its insiders. If sixty days pass after a shareholder demand has been made without the issuing company resolving the matter (either informally or via lawsuit), shareholders may file suit on the issuing company's behalf. However, shareholders must file their suit within two years of the transactions at issue, subject to the tolling rules described in greater detail *infra*.

A. Demand Requirement

[2] Section 16(b) provides in relevant part that all insider short-swing trading profits "shall inure to and be recoverable by the issuer," and "[s]uit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter ...." 15 U.S.C. § 78p(b). The issuing company's right to recover the insider's trading profits "is simply an application of an old principle in the law that if you are an agent and you profit by insider information concerning the affairs of your principal, your profits go to your principal." *Stock Exchange Regulation: Hearing Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 133 (1934) (statement of Thomas Corcoran, Counsel, Reconstruction Fin. Corp.) [7]

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[7] Certain courts and commentators have suggested that Section 16(b) actions are not true derivative actions. *E.g.*, *Dottenheim v. Murchison*, 227 F.2d 737, 738 (5th Cir. 1956); *Schaffer v. CC Investments, LDC*, 286 F. Supp. 2d 279, 281-82 (S.D.N.Y. 2003); 4 Hazen, *supra*, § 13.2 n.41; Peter J. Romeo & Alan L. Dye, *Section 16 Treatise and Reporting Guide*, § 9:03[1][a] (3d ed. 2008) (hereinafter Romeo & Dye.) We refrain from examining this question more closely because it is not relevant to the issues at hand. We note that derivative and quasi-derivative actions are generally governed by the

[3] Section 16(b) does not set forth any additional details regarding the nature and scope of this statutory demand requirement. In light of this Congressional silence, we turn to state law for guidance. The Supreme Court has explained that "where a gap in the federal securities laws must be bridged by a rule that bears on the allocation of governing powers within the corporation, federal courts should incorporate state law into federal common law unless the particular state law in question is inconsistent with the policies underlying the federal statute." *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991). Applying this broad principle in the context of the Investment Company Act of 1940, the Kamen Court held that "the contours of the demand requirement" (in that case, the standards governing demand futility) must be determined by the law of the state of incorporation. *Id.* at 101.

[4] Here, the adequacy of Simmonds's Section 16(b) demand letters is disputed in the thirty cases involving the Moving Issuers, all of which are Delaware corporations.[8] In light of the principles

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procedural requirements of Fed. R. Civ. P. 23.1. *See Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 533-34 (1984). However, two of our sister circuits have suggested that Rule 23.1 does not apply in Section 16(b) actions. *Portnoy v. Kawecki Berylco Indus., Inc.*, 607 F.2d 765, 767 n.3 (7th Cir. 1979); *Dottenheim*, 227 F.2d at 738. We refrain from deciding this question because it is not relevant to our analysis.

[8] Our analysis of Simmonds's demand letters is limited to the thirty cases in which the Moving Issuers contested the adequacy of Simmonds's demand. Although we have no reason

articulated in *Kamen*, these thirty demand letters must be analyzed in accordance with Delaware law, unless there is a conflict between Delaware law and federal law that "would frustrate specific objectives" of Section 16 and the Exchange Act. *Kamen*, 500 U.S. at 98 (citation, internal quotation marks, and alterations omitted). Our task under *Kamen* is the same as in any case decided under state law after *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). We must "'approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum.'" *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007) (quoting *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 939 (9th Cir. 2001)). Accordingly, we must follow the Delaware Supreme Court's pronouncements, or, if the Delaware Supreme Court has not addressed the question, "we must predict how the Court will decide the issue, based on decisions of Delaware courts, decisions from other jurisdictions, treatises and restatements." *Matsuura v. Alston & Bird*, 166 F.3d 1006, 1008 n.3 (9th Cir. 1999) (per curiam). In other contexts, we have relied

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to doubt Simmonds's assertion that she submitted "similar demands" to the twenty-four issuing companies that did not join the Motion to Dismiss, these letters are not currently part of the record and must be examined by the district court in the first instance. Accordingly, our analysis does not involve the twenty cases involving Delaware issuers who did not join the Moving Issuers' Motion to Dismiss, the two cases involving California issuers (Critical Path, Inc., and Openwave Systems, Inc.), or the cases involving a Washington issuer (Airspan Networks, Inc.) and a Bermuda issuer (Marvell Technology Group, Ltd.).

on the Delaware Court of Chancery's decisions as accurate statements of Delaware law, *id.* at 1008, and we note that there are particularly compelling reasons for following the Delaware Court of Chancery's decisions because it is widely recognized as the nation's leading authority on corporate law issues, *see, e.g.*, William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351 (1992).

The Delaware Supreme Court has explained that the demand requirement exists "first to insure that a stockholder exhausts his intracorporate remedies, and then to provide a safeguard against strike suits." *Aronson v. Lewis*, 473 A.2d 805, 811-12 (Del. 1984), *overruled en banc on other grounds by Brehm v. Eisner*, 746 A.2d 244, 253 & n.13 (Del. 2000). "The purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation, to decide whether to invest the resources of the corporation in litigation, and to control any litigation which does occur." *Spiegel v. Buntrock*, 571 A.2d 767, 773 (Del. 1990).[9] These justifications are not unique to Delaware. The Supreme Court has repeatedly highlighted these points, *Kamen*, 500 U.S. at 101; Daily Income Fund, 464 U.S. at 533, as have our sister circuits,[10] and leading commentators have approved.[11] As we have previously stated, the demand rule "is not merely a technical or unimportant requirement." *Potter*, 546 F.3d at 1058. Rather, it flows from "the general rule of American law ... that the board of directors controls a corporation." *Id.* Indeed, the policies animating shareholder demands are particularly relevant in the Section 16(b) context. "Anecdotal evidence suggests that well over 90 percent of all Section 16(b) claims are settled privately, without any lawsuit being filed." Romeo & Dye, *supra*, § 9.01[7][c] (footnote omitted). This figure would almost certainty be lower if Section 16(b) did not contain a demand

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[9] Another justification for the demand requirement is that the demand allows the corporation to exercise its business judgment and decide not to pursue the claim. *See Aronson*, 473 A.2d at 812 (noting that business judgment rule permits "independent disinterested directors to dismiss the action as inimical to the corporation's best interests"). This justification is inapplicable in Section 16(b) litigation because "[a]ny stockholder has a right to institute suit if the corporation fails to do so, regardless of the good faith or reasonable business

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judgment of the board of directors." *Pellegrino v. Nesbit*, 203 F.2d 463, 467 (9th Cir. 1953).

[10] *E.g., Grossman v. Johnson*, 674 F.2d 115, 125 (1st Cir. 1982); *Lewis v. Graves*, 701 F.2d 245, 247-48 (2d Cir. 1983); *Shaev v. Saper*, 320 F.3d 373, 377 (3d Cir. 2003); *Hoffman v. Kramer*, 362 F.3d 308, 317 n.4 (5th Cir. 2004); *In re Ferro Corp. Derivative Litig.*, 511 F.3d 611, 618 (6th Cir. 2008); *Boland v. Engle*, 113 F.3d 706, 712 (7th Cir. 1997); *Allright Missouri, Inc. v. Billeter*, 829 F.2d 631, 638 (8th Cir. 1987); *Stepak v. Addison*, 20 F.3d 398, 402 (11th Cir. 1994); *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 65 (D.C. Cir. 1988).

[11] 13 William Meade *Fletcher, Fletcher Cyclopedia of the Law of Corporations* § 5963 (Supp. 2010); American Law Institute, *Principles of Corporate Governance* § 7:03 cmt. c. (1992 & Supp. 2010); Daniel R. Fischel, Comment, *The Demand and Standing Requirements in Stockholder Derivative Actions*, 44 U. Chi. L. Rev. 168, 171-72 (1976).

requirement, as shareholder demands allow boards to investigate the allegations and resolve matters without resorting to costly and burdensome litigation.

[5] To give effect to these general policies, the Delaware Chancery has required that demand letters "specifically state: (i) the identity of the alleged wrongdoers, (ii) the wrongdoing they allegedly perpetrated and the resultant injury to the corporation, and (iii) the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw v. Talley*, Civ. A. No. 12882, 1994 WL 89019, at *7 (Del. Ch. Mar. 2, 1994) (unpublished opinion), *reprinted in* 20 Del. J. Corp. L. 454.[12] Furthermore, "the party asserting that a demand was made ... bear[s] the burden of proof ...." *Id.* These requirements flow directly from the underlying justifications for the demand requirement: "[i]t is essential that the communication contain these three elements to enable the board to perform its duty to make a good faith investigation of claims of alleged wrongdoing, and, where appropriate, to rectify the misconduct." *Id.* We believe that this is a correct statement of Delaware law as it would be decided by the Delaware Supreme Court. This standard was announced by a vice chancellor who was later elevated to the state supreme court, *see Gatz v. Ponsoldt*, No. Civ. A. 174-N, 2004 WL 3029868, at *5 (Del. Ch. Nov. 5, 2004) (unpublished opinion), and, more importantly, this standard has been uniformly followed in subsequent Chancery decisions.[13] Accordingly, under *Kamen* and our general *Erie* jurisprudence, we apply this legal standard (and the Delaware courts' applications of it) except where it "frustrate[s] specific objectives" of Simmonds's federal cause of action. *See Kamen*, 500 U.S. at 98.[14]

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[12] Delaware rules of court allow citation to unpublished chancery decisions. 1 David A. Drexler, et al., *Delaware Corporation Law and Practice* § 2.05 (2009).

Here, the thirty demand letters at issue in the Moving Issuers' motion (all of which were identical in all material respects) stated the following pertinent facts.[15] "[T]he Company's IPO underwriters, in addition to certain of its officers, directors and principal shareholders, as identified in the IPO prospectus ... coordinated their efforts for the purpose of acquiring, holding, and/or disposing of securities of the Company," obtained beneficial ownership of shares amounting to more than 10% of the company's outstanding common stock in the year following the IPO, "engaged in purchases and sales of Company within periods of less than six months during" that year, and failed to report those transactions as required by Section 16(a). Simmonds "demand[ed] that the board of directors prosecute a claim against" those persons "for violations of § 16(b) of the Securities Exchange Act of 1934," in order to "compel[ ] [them] to disgorge the profits they made through purchases and sales of Company stock."

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[13] *FLI Deep Marine LLC v. McKim*, No. Civ. A. 4138-VCN, 2009 WL 1204363, at *1 n.6 (Del. Ch. Apr. 21, 2009) (unpublished opinion); *Khanna v. McMinn*, No. Civ. A. 20545-NC, 2006 WL 1388744, at *13 (Del. Ch. May 9, 2006) (unpublished opinion); *Gatz*, 2004 WL 3029868, at *5.

[14] The federal district court in Delaware has articulated a similar standard regarding the demand requirement: "At a minimum, a demand must identify the alleged wrongdoers, describe the factual basis of the wrongful acts and the harm caused to the corporation, and request remedial relief. In most instances, the shareholder need not specify his legal theory, every fact in support of that theory, or the precise quantum of damages." *Allison v. Gen. Motors Corp.*, 604 F. Supp. 1106, 1117 (D. Del.), *aff'd mem.*, 782 F.2d 1026 (3d Cir. 1985). Many federal courts, including the district court in this case, have relied on *Allison* or its federal progeny when addressing the adequacy of a demand under Delaware law. *See, e.g.*, *Richelson v. Yost*, __ F. Supp. 2d __, No. 10-1342, 2010 WL 3563108, at *8 (E.D. Pa. Sept. 9, 2010); *Dreiling v. Am. Express Co.*, 351 F. Supp. 2d 1077, 1085 (W.D. Wash. 2004), *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006); *Levner v. Saud*, 903 F. Supp. 452, 456 (S.D.N.Y. 1994), *aff'd sub nom. Levner v. Prince Alwaleed*, 61 F.3d 8, 9 (2d Cir. 1995); *Rubin v. Posner*, 701 F. Supp. 1041, 1045 (D. Del. 1988). We believe, however, that the better approach is to rely on Delaware state courts to the greatest extent possible. Under *Kamen*, we give preference to the state courts' approach.

In response to twenty-five of the thirty Moving Issuers' requests for additional information, Simmonds explained that "the challenged transactions involved the activities of the lead underwriters, the other IPO underwriters, and the officers, directors and principal shareholders of the Company ... related to improper IPO allocation (so-called 'laddering' and 'spinning') and research and stock rating activities during the Relevant Period. As you are aware, information regarding these activities is readily available at court, law firm and SEC websites."[16]

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[15] The demand letters were identified in the Complaints, and the thirty letters sent to the Moving Issuers were submitted to the district court as part of their Motion to Dismiss. Because the parties did not dispute the authenticity of these documents, we may consider them without converting the motion to dismiss into a motion for summary judgment. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

[6] Simmonds's initial demand letters satisfied the first part of the Delaware test for demand adequacy, which requires the shareholder to state "the identity of the alleged wrongdoers." *Yaw*, 1994 WL 89019, at *7. In ***FLI Deep Marine v. McKim***, the plaintiff's demand letter stated that "'certain employees, officers and directors of [the company] and others'" had diverted and misappropriated the company's assets. *FLI Deep Marine*, 2009 WL 1204363, at *1 (quoting demand letter). The Court of

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[16] These follow-up letters were not mentioned in the Complaints or submitted by any of the Defendants in connection with the various motions to dismiss. Rather, they were submitted by Simmonds in opposition to the Moving Issuers' Motion to Dismiss. Ordinarily such extrinsic evidence may not be considered at this stage of the litigation. *See Knievel*, 393 F.3d at 1076. The district court determined, however, that these documents could be considered as part of the defendants' challenge to subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1). *See In re Section 16(b) Litig.*, 602 F. Supp. 2d 1202, 1210 (W.D. Wash. 2009) ("A jurisdictional challenge under [Rule 12(b)(1)] may be made on the face of the pleadings or by presenting extrinsic evidence." (citing *Warren v. Fox Family Worldwide*, Inc., 328 F.3d 1136, 1139 (9th Cir. 2003)). Because we are proceeding under Fed. R. Civ. P. 12(b)(6) rather than Fed. R. Civ. P. 12(b)(1), we do not have the benefit of going beyond the pleadings as the district court did. However, we may consider Simmonds's follow-up letters to support our conclusion that Simmonds's thirty Complaints involving the Moving Issuers must be dismissed with prejudice. *See Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003).

Chancery stated that this letter was sufficient to satisfy the first prong of Yaw. *Id.* at *1 n.6. Simmonds's demand letters identify the alleged wrongdoers with a similar level of precision as in the *FLI Deep Marine* plaintiff's demand letter. Specifically, Simmonds's letters identified "the Company's IPO underwriters, in addition to certain of its officers, directors and principal shareholders, as identified in the IPO prospectus." Although the Moving Issuers contend that their respective prospectuses listed between eleven and fifty-one underwriters, officers, and directors, and we acknowledge that this is a close question, we follow the Court of Chancery's approach in *FLI Deep Marine*.[17] Because Simmonds's demand letters identified a closed set of alleged wrongdoers, we agree with the district court that "the demand letters in this case sufficiently identify the alleged wrongdoers." *In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1212.

Simmonds's letters failed, however, to satisfy the second and third prongs of the Delaware test for demand adequacy, which require the shareholder to identify the "wrongdoing ... allegedly perpetrated" and "the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw*, 1994

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[17] The Court of Chancery's approach is in tension with the Third Circuit's holding in *Shlensky v. Dorsey*, 574 F.2d 131, 140-41 (3d Cir. 1978), in which the court held that demand letters were inadequate where they alleged that the "responsible individuals" should be held accountable.

WL 89019, at *7.[18] Simply put, Simmonds's demand letters presented factual theories that vary significantly from the facts alleged in the Complaints. Her demand letters claimed that the Underwriters directly bought and sold the Issuing Companies' shares, and accordingly requested that the Issuing Companies seek disgorgement of the Underwriters' trading profits. In contrast, her Complaints do not allege that the Underwriters directly participated in buying and selling the Issuing Companies' stock, and instead seek disgorgement of the profits the Underwriters received through their investment banking operations.[19]

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[18] Although the Delaware courts require the demand to describe "the resultant injury to the corporation," *Yaw*, 1994 WL 89019, at *7, this requirement "frustrate[s] specific objectives" of Section 16(b) by adding an additional element to the Section 16(b) cause of action. *See Kamen*, 500 U.S. at 98. Section 16(b) exists to remedy harms suffered by the general investing public, not harms suffered by issuing corporations. *See Kern County*, 411 U.S. at 591-92; *Champion Home Builders Co. v. Jeffress*, 490 F.2d 611, 619 (6th Cir. 1974) ("the absence of corporate damage is not a factor in assessing § 16(b) liability"). Accordingly, a shareholder's demand letter need not identify any corporate injury in order to satisfy the demand requirement of Section 16(b).

[19] In *Simmonds v. Morgan Stanley & Co., Inc.*, No. 09-35352, Simmonds alleges that Morgan Stanley and J.P. Morgan (the successor-in-interest to Hambrecht & Quist LLC) respectively sold $46.5 million and $34.6 million in shares of Internap Network Services Corporation as part of a secondary offering. Although Simmonds identified these transactions in her Complaint, she failed to allege that these transactions violated Section 16(b) and she failed to seek disgorgement of

[8] According to the Complaints, the Underwriters violated Section 16(b) when they profited *indirectly* through their *customers'* purchases and sales of the Issuing Companies' shares. Specifically, the Complaints allege that the Underwriters engaged in "Short-Swing Transactions" when (1) their existing customers purchased and sold the issuing company's stock, (2) they obtained new banking customers in exchange for giving other companies' insiders favorable consideration in the issuing company's IPO, and (3) they obtained additional banking business from the issuing company in exchange for helping the issuing company's insiders profit from their own company's IPO. The Complaints assert that these "Short-Swing Transactions" violated Section 16(b), and request disgorgement of profits obtained through these "Short-Swing Transactions." None of these alleged transactions is referenced in any way in the original demand letters submitted to the Moving Issuers. The garden-variety Section 16(b) claim made out in these demand letters bears no resemblance to the elaborate scheme described in Simmonds's Complaints.

[9] Even if we consider Simmonds's follow-up letters to twenty-five of the Moving Issuers, she failed to identify the wrongful acts "clearly and specifically." *Yaw*, 1994 WL 89019, at *8. The

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any profits obtained from these transactions. Accordingly, her demand letter to Internap Network Services Corporation (which is one of the Moving Issuers), was defective for the same reasons as in the other cases.

follow-up letters noted that the "challenged transactions ... [are] related to improper IPO allocation (so-called 'laddering' and 'spinning') and research and stock rating activities." Simmonds's conclusory references to "laddering," "spinning," and "research and stock rating," were vague and ambiguous, as was her open ended reference to "court, law firm and SEC websites," and completely failed to provide sufficiently detailed information to permit the boards to conduct a good faith inquiry into the alleged wrongdoing.

[10] Moreover, because the demand letters and the Complaints contain distinct factual assertions, the demand letters also failed to set forth "the legal action the shareholder wants the board to take on the corporation's behalf." *Yaw*, 1994 WL 89019, at *7. The demand letters requested that the Moving Issuers "compel[ ]" the Underwriters and other group members to "disgorge the profits they made through purchases and sales of [the issuing company's] stock." The Complaints, on the other hand, do not mention the Underwriters' direct trading profits, and instead seek disgorgement of the profits the Underwriters received through their investment banking operations.

[11] The Court of Chancery has noted that demand letters must be sufficiently specific to "enable the board to perform its duty to make a good faith investigation of claims of alleged wrongdoing[ ] and ... to rectify the misconduct" at issue in a subsequent lawsuit. *Yaw*, 1994 WL 89019, at *7. The court further noted that "to require a board to investigate claims asserted ambiguously ... would not be an efficient use of corporate resources, because the board would lack the information necessary to make a good faith inquiry." *Id.* Simmonds's demand letters were particularly inadequate because they described a different course of conduct than the one she described in her Complaints. And clearly, Simmonds's demand letters could have led directors to investigate facts (the Underwriters' purchases and sales of Issuing Company stock) that were only marginally related to the issues ultimately raised in the Complaints (the Underwriters' *customers'* purchases and sales of Issuing Company stock, and associated profit-sharing agreements between the Underwriters and their customers).

We are not persuaded by Simmonds's argument that the Moving Issuers subjectively understood what she meant in her demand letters. Delaware case law sets forth an objective standard for assessing the adequacy of a demand and does not inquire whether the board of directors had independent knowledge of relevant information. To the extent that Simmonds's argument has been addressed by any courts, it has been soundly rejected. For example, the Third Circuit has rejected a shareholder's argument that a conclusory demand was adequate because "the directors were in a better position than the shareholders to make the investigation necessary to uncover wrongdoers." *Shlensky*, 574 F.2d at 141. In the related context of demand refusal, the Delaware Supreme Court rejected the argument that "[t]he board has better access to the relevant facts" and plaintiffs should therefore be relieved of their burden to show that the board's refusal was improper. *Levine v. Smith*, 591 A.2d 194, 209 (Del. 1991) (internal quotation marks omitted), *overruled en banc on other grounds by Brehm*, 746 A.2d at 253 & n.13.

Simmonds's argument is an end-run around Delaware's requirement that shareholders make reasonably specific demands, and were we to adopt Simmonds's proposed approach, Delaware's demand standard would be eviscerated. Plaintiffs in derivative actions often seek relief for a corporate insider's wrongdoing. If the demand requirements were relaxed on account of insiders' subjective knowledge, then shareholders would *never* have to "clearly and specifically" describe their assertions in a demand letter. *See Yaw*, 1994 WL 89019, at *8. To the extent that Simmonds believed that relevant information was "readily available at court, law firm and SEC websites" as she claimed in her follow-up letters, it was her burden under Delaware law to distill the relevant facts and present them to the board. ~~If Simmonds lacked access to necessary information that was exclusively within the corporation's possession, Delaware law specifically allows a shareholder to examine "[t]he corporation's stock ledger, a list of its stockholders, and its other books and records," Del. Code Ann. tit. 8, § 220(b)(1), and Delaware courts have strongly encouraged shareholders to avail themselves of such investigative tools, *see King v. VeriFone Holdings, Inc.*, 994 A.2d 354, 356 & nn.2-3 (Del. Ch. 2010) (collecting cases). In short, Delaware law does not allow shareholders to forego pre-suit investigations in an attempt to shift information-gathering costs onto the corporation.~~ Delaware law does not allow shareholders to forego pre-suit investigations in an attempt to shift information-gathering costs onto the corporation, and this rule is not clearly incompatible with Section 16 and the Exchange Act.

~~Simmonds also argues in part that these Delaware rules are incompatible with Section 16. She alleges that she was unable to obtain necessary information because the group members failed to file Section 16(a) reports as required by federal law. We disagree with Simmonds's contention that Delaware's demand-specificity requirement is incompatible with Section 16(b). Delaware law expressly permits shareholders to inspect the corporation's "stock ledger," which "is a compilation of the transfers by and to each individual shareholder, with each transaction separately posted to separately maintained shareholder accounts."~~ ~~*Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 393 (Del. 2010) (en banc) (internal quotation marks omitted). In most Section 16(b) cases, a request to inspect the issuing company's books and records (including the stock ledger) would likely allow shareholders to gather enough information to submit an adequate demand to the issuing company. Simmonds does not appear to have made any effort to obtain such information prior to submitting her demand letters and filing her lawsuits. Accordingly, we hold that Delaware's state law demand requirement is compatible with Section 16.~~

As an alternative to her argument that her demand letters were adequate, Simmonds contends that the demand requirement should be excused as futile. However, Delaware courts have repeatedly held that a shareholder concedes that a demand is not futile by submitting a demand to the board. "Delaware law could hardly be clearer" in holding that shareholders may not invoke the futility exception after submitting a demand to the board. *FLI Deep Marine*, 2009 WL 1204363, at *3; *see also id.* at *3 n.17 (collecting cases).

[12] We hold that the thirty demand letters in the record fail to satisfy the demand requirement under Delaware law. Accordingly, we affirm the district court's order granting the Moving Issuers' motions to dismiss the thirty cases to which they are parties.

B. Statute of Limitations

[13] The district court dismissed the cases involving the remaining twenty-four issuers (that is, the Issuing Companies that did not join the Moving Issuers' Motion to Dismiss) on account of the statute of limitations. Section 16(b) provides that " no ... suit shall be brought more than two years after the date such profit was realized" from the alleged short-swing transactions. 15 U.S.C. § 78p(b). We have previously issued a thorough decision interpreting this provision, *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981), and we are bound by our prior holding.

In *Whittaker*, a corporate insider engaged in prohibited short-swing transactions between December 1965 and December 1970. The corporation sought disgorgement in January 1971 without filing a lawsuit. The insider paid the full amount requested, but later filed suit against the corporation seeking to recover some of the money he had paid. *Id.* at 518-19. In the lawsuit, he argued that Section 16(b)'s statute of limitations barred the corporation from retaining any amounts that he had obtained from short-swing transactions prior to January 1969 (that is, two years prior to the time that the corporation requested that he disgorge his profits). *Id.* at 519. The district court agreed with the insider, and "found that various corporate officers had information which put the Corporation on notice throughout the relevant trading period" between 1965 and 1970. *Id.* at 527. Based on this factual finding, the district court allowed the corporation to recover the insider's profits only for the two years prior to the disgorgement request. *Id.* at 519, 527; *see also Whittaker v. Whittaker Corp.*, No. 75-2546, 1977 WL 1006, at *9-10 (C.D. Cal. Mar. 22, 1977) (setting forth factual findings in greater detail).

On appeal, we explained that there were three competing approaches to Section 16(b)'s statute of limitations: (1) a "strict" approach under which the statute is treated as a statute of repose—that is, a firm bar that is not subject to tolling; (2) a "notice" or "discovery" approach like the one that had been applied by the district court, "under which the time period is tolled until the Corporation had sufficient information to put it on notice of its potential § 16(b) claim;" and (3) a "disclosure" approach "under which the time period is tolled until the insider discloses the transactions at issue in his mandatory § 16(a) reports." *Whittaker*, 639 F.2d at 527. After thoroughly analyzing the merits of the competing interpretations, *id.* at 527-30, we held unequivocally that "the disclosure interpretation is the correct construction of § 16." *Id.* at 527. Under this approach, "an insider's failure to disclose covered transactions in the required § 16(a) reports tolls the two year limitations period for suits under § 16(b) to recover profits connected with such a non-disclosed transaction. The two-year period for § 16(b) begins to run when the transactions are disclosed in the insider's § 16(a) report." *Id.* at 530. Accordingly, we reversed the district court's use of the "notice" approach and held that the corporation could recover all of the insider's short-swing profits, even those obtained long after the corporation was on notice of the insider's trading. *Id.*

[14] In this case, the Defendants advance various arguments in an attempt to distinguish *Whittaker*. All of these arguments are variations on a single theme—Simmonds knew or should have known of the alleged wrongful conduct many years before she filed her Complaints. But despite the Defendants' arguments, the central holding of our opinion in *Whittaker*—both in our legal analysis and our application of the law to the facts of that case—is that the Section 16(b) statute of limitations is tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue. We recently restated this holding in *Roth v. Reyes*, 567 F.3d 1077 (9th Cir. 2009), in which we concluded that the statute of limitations begins to run when the insider files a Section 16(a) report *even if* the contents of the filing inaccurately claim an exemption that does not actually apply. *Id.* at 1083. We explained that the basic act of filing a Section 16(a) report satisfies *Whittaker*'s disclosure requirement and "supports the goals of disclosure and transparency" underlying Section 16. *Id.* at 1083.

The Defendants advance four specific points in support of their general theory that *Whittaker* can be distinguished. First, they argue that *Whittaker* does not apply because Simmonds knew or should have known of the relevant facts sometime around 2001. By that time, much of the information described in the Complaints had been publicly disclosed in court filings, news reports, and the Issuing Companies' IPO registration filings. The Defendants contend that "[w]hen a party is aware of the necessary facts to bring a claim, there is no excuse for any delay beyond the statute of limitations period, let alone a delay of six years." However, this theory was plainly rejected in *Whittaker*. Our *Whittaker* decision *reversed* the district court's conclusion that the statute of limitations began to run at the time that "various corporate officers had information which put the Corporation on notice" of the insider's short-swing trades. *Whittaker*, 639 F.2d at 527. The Defendants' "notice" argument is an unpersuasive attempt to revive a theory that we considered and rejected nearly thirty years ago.

Second, the Defendants argue that the Section 16(b) limitations period should not be tolled indefinitely unless the defendant actively "conceal[s] the facts necessary to trigger a Section 16(b) lawsuit."[20] This theory overlooks the footnote in *Whittaker* in which we explained that "[t]he failure to disclose in § 16(a) reports, whether intentional or inadvertent, is deemed concealment, thus triggering the traditional equitable tolling doctrine of fraudulent concealment." *Id.* at 527 n.9. That conclusion was further bolstered by our emphasis on creating a rule that can be "mechanically calculated from objective facts," *id.* at 529, which would be undermined if courts were required to conduct case-specific inquiries into the insiders' state of mind about their failure to file Section 16(a) reports.

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[20] This approach was advocated by Judge Jacobs of the Second Circuit in *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203, 208 n.5 (2d Cir. 2004) (Jacobs, J., concurring) ("The author of this opinion ... would have preferred to say that the statute of limitations in Section 16(b) is equitably tolled only when the failure to file is intentional or unreasonable.").

Third, the Defendants contend that *Whittaker* does not apply in this case because the Underwriters are exempt from Section 16(a) reporting requirements under the SEC's under-writing and market-making exemptions. However, this argument finds no support in *Whittaker*'s bright-line rule. *See Whittaker*, 639 F.2d at 527 & n.9, 530. In any event, were we to follow the Defendants down this line of argument, we would soon find ourselves deciding the substantive merits of the parties' dispute. The question of whether or not the Underwriters are exempt from filing Section 16(a) reports is identical to the question of whether they may be held liable under Section 16(b). We refrain from adopting an approach that "would merge the tolling doctrine with the substantive wrong ...." *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1177 (9th Cir. 2000).

Finally, the Defendants argue that *Whittaker* does not apply because it involved a *corporation* that was seeking disgorgement, rather than an *outside shareholder* as in the instant case. They assert that we should adopt different lines of analysis depending on whether the plaintiff is an issuing company or is an outside shareholder such as Simmonds. However, our decision in *Whittaker* created a blanket rule that applies in *all* Section 16(b) actions. A key component of our reasoning was that Section 16(a) notices allow the company's shareholders—who "are likely to be outsiders, minority holders"—to obtain the information necessary to bring a Section 16(b) action. *Whittaker*, 639 F.2d at 528. Nothing in *Whittaker*'s logic or reasoning would allow us to distinguish between issuing companies and outside shareholders, and we refrain from adopting such a strained interpretation of our precedent.

[15] In short, the fundamental holding of *Whittaker* is that Section 16(b)'s two-year statute of limitations begins to run from the time that the defendant files a Section 16(a) disclosure statement. Because Simmonds alleges that the Defendants did not file any Section 16(a) reports, we conclude that Simmonds's claims are not time-barred. Accordingly, the district court's decision on this ground is reversed.

C. Cross-Appeal

In their cross-appeal, the Underwriters contend that the district court erred by dismissing the thirty cases involving the Moving Issuers without prejudice on account of Simmonds's inadequate demand. They argue that these dismissals should have been with prejudice because Simmonds's claims are time-barred. Although we disagree that Simmonds's claims are time-barred, we agree that the district court should have dismissed the thirty Complaints against the Moving Issuers with prejudice on account of her failure to satisfy the Section 16(b) demand requirement in those cases.

[16] We have previously held that a complaint may be dismissed with prejudice on account of the plaintiff's failure to satisfy the demand requirement, *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 990-91 (9th Cir. 1999), *abrogated on other grounds*, *Tellabs, Inc. v. Makor Issues & Rights*, 551 U.S. 308, 322-24 (2007), and various other circuits have reached the same conclusion.[21] Although the district court dismissed Simmonds's thirty Complaints against the Moving Issuers "without prejudice," our decision to convert the dismissal is not unprecedented. In a derivative action in which the shareholder failed to show demand futility, the First Circuit *sua sponte* converted the district court's dismissal from "without prejudice" to "with prejudice." *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973). The court explained that the plaintiff was barred from relitigating the issues decided in that action, and accordingly the dismissal should have been entered with prejudice rather than without. *Id.*

[17] We agree with the First Circuit's approach in Kauffman. Simmonds is barred from relitigating issues relating to the adequacy of the demand letters she sent to the thirty Moving Issuers and the follow-up letters she sent to twenty-five of the Moving Issuers. As with any issue litigated fully on merits, shareholders may not endlessly relitigate the adequacy of their pre-suit demand. Accordingly, we vacate the district court's order dismissing without prejudice the thirty cases involving the Moving Issuers, and the district court is instructed to dismiss these thirty cases with prejudice.

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[21] *E.g.*, *Kanter v. Barella*, 489 F.3d 170, 175 (3d Cir. 2007) (dismissal with prejudice and without leave to amend); *Starrels v. First Nat'l Bank of Chicago*, 870 F.2d 1168, 1169, 1172 (7th Cir. 1989) (dismissal with prejudice and without leave to amend); *Gaubert v. Fed. Home Loan Bank Bd.*, 863 F.2d 59, 62, 69 (D.C. Cir. 1988) (dismissal with prejudice and without leave to amend); *Shlensky*, 574 F.2d at 141-42 (dismissal without leave to amend); *In re Kauffman Mut. Fund Actions*, 479 F.2d 257, 267 (1st Cir. 1973) (dismissal with prejudice).

[18] In the twenty-four cases that were improperly dismissed as time-barred and in which the Issuing Companies did not join the Moving Issuers' Motion to Dismiss, the district court is directed to permit the Underwriters and Issuing Companies to seek dismissal on account of Simmonds's failure to comply with the demand requirement.[22] We note that our discussion in this

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[22] Contrary to the district court's suggestion, *see In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1211, the Underwriters should be permitted to file motions challenging Simmonds's compliance with the demand requirement. *See Shlensky v. Dorsey*, 574 F.2d 131, 142 (3d Cir. 1978) ("it is well settled ... that defendants other than the corporation whose rights the shareholder plaintiffs are seeking to vindicate may successfully raise the defense of failure to comply with Rule 23.1" and the demand requirement); *accord Hawes v. City of Oakland*, 104 U.S. 451, 461-62 (1881) (complaint dismissed on motion by third party defendant); *Brody v. Chem. Bank*, 517 F.2d 932, 933 (2d Cir. 1975) (per curiam) (complaint dismissed sua sponte).

The Delaware Supreme Court has thoroughly and persuasively explained why third parties have standing to raise defenses based on the shareholder's failure to comply with demand requirement. *Kaplan v. Peat, Marwick, Mitchell & Co.*, 540 A.2d 726, 730 (Del. 1988). "The standing of a third party to assert demand related defenses must be determined, not on the basis of whether such status benefits the interests of the third party, but whether according such status furthers the nature and purpose of the demand requirement." *Id.* The court opinion will almost certainly resolve the twenty remaining cases involving issuers incorporated in Delaware. (We express no opinion regarding the four cases involving non-Delaware issuers.) However, as Simmonds' demands letters to those companies are

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explained (as we discussed supra) that "[t]he purpose of pre-suit demand is to assure that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation and to control any litigation which does occur." *Id.* Accordingly, the court concluded that third party defendants may challenge the sufficiency of a shareholder's demand. *Id.*

We agree with the reasoning of the Delaware Supreme Court in ***Kaplan***, and disagree with the district courts that have held that this result is at odds with the purposes of Section 16(b). *See In re Section 16(b) Litig.*, 602 F. Supp. 2d at 1211 (collecting cases). In light of our general discussion of the demand requirement, we conclude that the Section 16(b) demand requirement—like the demand requirement in all derivative actions—exists for the purpose of allowing corporations to investigate their insiders' wrongdoing, resolve disputes without resorting to litigation, and control any litigation that may take place. *See* ***Kaplan***, 540 A.2d at 730. In addition, we note that the demand requirement of Section 16(b) is a *required* statutory precondition to a shareholder's lawsuit. *See* 15 U.S.C. § 78p(b). As the Delaware Supreme Court explained in ***Kaplan***, third parties are permitted to raise demand-related defenses because a shareholder's "right to bring a derivative action does not come into existence until the plaintiff shareholder has made a demand on the corporation to institute such an action." *Id.* We see no reason why such reasoning does not apply in the Section 16(b) context.

Accordingly, in the twenty-four cases being remanded, the district court should follow the general rule under both Delaware law and federal law: any defendant in a Section 16(b) action may challenge the adequacy of the shareholder's pre-suit demand.

not in the record, we leave it to the district court to address those cases in the first instance.[23] We note that four of the cases involve issuers incorporated in jurisdictions other than Delaware (two issuers are incorporated in California, one in Washington, and one in Bermuda). We direct the district court to analyze the adequacy of those demand letters in accordance with the choice-of-law principles articulated in *Kamen*—namely, the court should apply the demand requirements of California, Washington, and Bermuda law, unless those requirements "would frustrate specific objectives" of Section 16 and the Exchange Act. *Kamen*, 500 U.S. at 98 (citation, internal quotation marks, and alterations omitted).

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[23] Because consolidated appeals "do not merge into one" for all purposes, Fed. R. App. P. 3 advisory committee's note (1998 amend.), the district court should be careful about invoking the "law of the case" doctrine in the remanded cases involving the twenty issuers incorporated in Delaware that did not join the Moving Issuers' Motion to Dismiss, *see generally*, Joan Steinman, *Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation*, 135 U. Pa. L. Rev. 595, 623-25 (1987) (hereinafter Steinman); *cf. State HMO Management, Inc. v. Tingley Systems, Inc.*, 181 F.3d 174, 180 (1st Cir. 1999) (treating consolidated cases "as a single action for res judicata purposes"). However, if Simmonds's demand letters to those twenty Delaware-incorporated issuers are substantially similar to the thirty demand letters examined in this opinion, the district court is bound by *stare decisis* to apply our holding that demand letters such as the thirty letters we have examined are inadequate as a matter of Delaware law. *See* Steinman, *supra*, at 624-25.

CONCLUSION

We **AFFIRM** the district court's conclusion that Simmonds's demand letters to the thirty Moving Issuers were inadequate under Delaware law, **REVERSE** the district court's conclusion that all of Simmonds's claims are time-barred, and **VACATE** the district court's dismissal orders as to the thirty Moving Issuers with instructions that the district court dismiss these thirty cases with prejudice on account of Simmonds's failure to satisfy Delaware's demand requirement. We **REMAND** the remaining twenty-four cases (that is, the cases involving the twenty-four Issuing Companies that did not join the Moving Issuers' Motion to Dismiss) with instructions for the district court to allow the Underwriters and Issuing Companies to file an appropriate motion to challenge the adequacy of Simmonds's demand letters under Delaware, California, Washington, and Bermuda law, unless that law conflicts with Section 16(b). Costs are awarded to the Appellees.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED IN PART.

M. SMITH, Circuit Judge, specially concurring:

The statutory text of Section 16(b) provides that "no such suit shall be brought more than two years after the date such profit was realized." 15 U.S.C. § 78p(b). In my view, "no suit" means no suit, and "two years after the date such profit was realized" means two years after the insider's final profitable transaction, regardless of when—or even if—a Section 16(a) report is filed. The text of the statute sets a firm bar against Section 16(b) suits filed more than two years after the transaction is completed. Accordingly, I agree with the Supreme Court's *dictum* that Section 16(b) "sets a 2-year ... period of repose." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 n.5 (1991).

This straightforward textual reading is further confirmed by comparing the language of Section 16(b) with the language of the other statutes of limitations in our securities laws. *See Lampf*, 501 U.S. at 360-61 & nn.5-7. The Court in *Lampf* explained that language such as Section 16(b)'s "no such suit shall be brought" creates periods of repose that are not subject to tolling. *Id.* at 360-61, 363. In addition, the general securities fraud statute of limitations added by the Sarbanes-Oxley Act of 2002, 116 Stat. 801, provides that securities fraud suits "may be brought not later than ... 5 years after such violation." 28 U.S.C. § 1658(b)(2). The Supreme Court recently noted that this provision "giv[es] defendants *total repose* after five years." *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1797 (2010) (emphasis added). There is little meaningful distinction between the language of 28 U.S.C. §

1658(b)(2) and Section 16(b)—one provides that suits "may be brought not later than ... 5 years after such violation," and the other provides that "no such suit shall be brought more than two years after the date such profit was realized." To me, this nearly identical language should "giv[e] defendants total repose" under both statutes. *See Merck*, 130 S. Ct. at 1797.

There are numerous reasons why Congress would elect to create a firm two-year period of repose for Section 16(b) actions. Although there is no direct evidence of Congress's intent, the legislative history has left behind an intriguing clue. When the Senate and House of Representatives passed their respective bills that later became the Exchange Act, the House of Representatives's version did not even provide for a private right of action under Section 16(b), whereas the Senate's version provided a right of action but omitted a statute of limitations. Romeo & Dye, *supra*, § 1.02[3][b][vi]. It is reasonable to infer that the House negotiators, in reaching a compromise with the Senate over the inclusion of a private right of action, might have bargained to include a stringent statute of limitations to circumscribe that right of recovery.

Admittedly, the legislative history is inconclusive, but a restrictive statute of limitations is eminently logical. Section 16(b) imposes an inflexible penalty on corporate insiders even if they are not at fault and third parties are unharmed. As Section 16(b)'s critics have noted, its disgorgement provision "is little more than a trap for the unwary." *Id.* § 9.01[11][a]. It makes no sense to allow individuals to be hauled into court years—or even decades—after they unintentionally violate Section 16. Our holding in *Whittaker* creates the possibility that "a claim that affects long-settled transactions might hang forever over honest persons." *Litzler v. CC Investments, L.D.C.*, 362 F.3d 203, 208 n.5 (2d Cir. 2004) (Jacobs, J., concurring). *Whittaker* could lead to the anomalous situation in which a corporate officer who mistakenly calculates the six-month short-swing period can be compelled to disgorge his trading profits decades after the fact, whereas a culpable officer who engages in fraudulent insider trading becomes immune from civil suit after five years as long as his trades were spaced more than six months apart. I fail to see the logic behind such a result, and I fear that *Whittaker* failed to foresee such anomalies.

I note that *Whittaker* was motivated by the well-intentioned concern that corporate insiders could avoid Section 16(b) liability if they flout Section 16(a)'s reporting requirements. However, I do not believe that this concern warrants the creation of never-ending liability for corporate directors, officers, and shareholders. The Exchange Act is a comprehensive statute that was designed to address various types of wrongdoing. It is inappropriate for us to use Section 16(b), which prohibits certain types of insider trading, to enforce the policies of Section 16(a), which requires disclosure of insider trading. The Exchange Act creates more than adequate enforcement mechanisms for enforcing Section 16(a)'s disclosure requirements. If the insiders do not file their reports, they may be held professionally, civilly, or criminally liable for failing to do so. *See, e.g.*, 15 U.S.C. § 78ff(a) (criminal penalties); *In re Gold*, Exchange Act Release No. 34-

51585, 85 S.E.C. Docket 724 (Apr. 20, 2005) (professional and civil penalties). And if the insiders withhold their Section 16(a) reports in order to profit from inside information, they may be subjected to Rule 10b-5 securities fraud actions. *See, e.g.*, *In re Daou Sys., Inc.*, 411 F.3d 1006, 1022-24 (9th Cir. 2005).

Ultimately, I believe that *Whittaker*'s cure is worse than the disease it intended to address. I would have preferred to adopt any one of the three alternatives to *Whittaker*: the statute of repose approach, *Lampf*, 501 U.S. at 360 n.5, the actual notice approach, *Litzler*, 362 F.3d at 208, or the hybrid approach that tolls the statute in cases of "fraud or concealment," *id.* at 208 n.5 (Jacobs, J., concurring). Of these three approaches, the statutory text and statutory structure clearly point toward the repose approach. Were it not for *Whittaker*, I would hold that Section 16(b) suits may not be brought more than two years after the short-swing trades take place.

Despite these concerns, I am compelled to follow *Whittaker*. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). Accordingly, I concur with the panel's decision.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[Caption omitted]

ORDER

The Opinion filed on December 2, 2010 is amended to appear as set forth below in the Amended Opinion filed concurrently with this Order.

On slip opinion page 19110, footnote 5, lines 5 and 6, "Digimarc Corporation;" is deleted.

On slip opinion page 19110, footnote 5, line 8, "Openwave Systems Inc.;" is deleted.

On slip opinion page 19124, lines 16 through 27, the text beginning with "If Simmonds lacked access to necessary information" through the end of the paragraph is deleted and replaced with the following: "Delaware law does not allow shareholders to forego pre-suit investigations in an attempt to shift information-gathering costs onto the corporation, and this rule is not clearly incompatible with Section 16 and the Exchange Act."

On slip opinion page 19124, line 28, through page 19125, line 11, the paragraph is deleted in its entirety.

With this amendment, the panel has unanimously voted to deny Appellees' petition for panel rehearing. Judges Thomas and M. Smith have voted to deny Appellant's petition for rehearing en banc, and Judge Hogan has so recommended. Judge Thomas has voted to deny Appellees' petition for rehearing en banc, and Judge Hogan has so recommended. Judge M. Smith has voted to grant Appellees' petition for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on them. Fed. R. App. P. 35.

The petition for rehearing and petitions for rehearing en banc are DENIED. No further petitions for rehearing may be filed.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE: SECTION 16(B) LITIGATION	MASTER CASE NO. C07-1549JLR ORDER DISMISSING CASES

I. INTRODUCTION

Before the court are 54 derivative shareholder actions brought by one shareholder, Plaintiff Vanessa Simmonds. The cases are based on the theory that Defendants engaged in insider trading during the late-1990s and early 2000 during which there was an increase in private companies going public. Ms. Simmonds sued the underwriters that were responsible for underwriting the Initial Public Offerings ("IPOs") for many of these companies (hereinafter the "Underwriter Defendants"), whose duties included setting an IPO price for the shares.[1]

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[1] An IPO is a financing tool companies use to raise capital through equity rather than debt. An issuing company, also referred to as "the issuer," can earn equity capital by selling its shares to a large number of public investors. This process of raising capital is commonly referred to "going public" or an "initial public offering."

Ms. Simmonds also names, as nominal defendants, the companies themselves (hereinafter the "Issuer Defendants"). She asserts a claim for violation of Section 16(b) of the Securities and Exchange Act of 1934 (the "Act") against each of the Underwriter Defendants. She contends that during the underwriting process the Underwriter Defendants made agreements with other insiders and certain investors in order to profit from under priced IPOs.

Before the court is a motion to dismiss pursuant to Rule 12(b)(1) filed by 30 of the 54 Issuer Defendants in C07-1549 (Dkt. # 56); an omnibus motion to dismiss filed by all of the Underwriter Defendants in C07-1549 (Dkt. # 57); and supplemental individual motions to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47), Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33), and Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39).[2] The Issuer Defendants' motion to dismiss (Dkt. # 56) presents the threshold question whether Plaintiff Vanessa Simmonds has standing to bring these derivative claims because she failed to make an adequate demand on the Issuer Defendants before instituting these actions.[3] In the Underwriter Defendants' omnibus motion, as well as part of the Issuer Defendants' motion, the Defendants ask the court to determine whether the statute of limitations for bringing these Section 16(b) claims has expired. The remaining supplemental motions seek dismissal of Ms. Simmonds' complaints against certain Issuer Defendants bringing motions for lack of standing based on separate sets of facts. For the reasons stated below, the court GRANTS in part and DENIES in part the motions as follows:

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[2] Unless noted otherwise, all docket references are to the master docket found at *Simmonds v. Credit Suisse Sec., et al.*, C07-1549.

[3] It is unclear why only 30 of the 54 Issuer Defendants joined in the motion to dismiss. This may be the result of the remaining 24 Issuer Defendants believing that Ms. Simmonds has standing based on the information she provided to those Issuer Defendants. The court questioned Issuer Defendants'

- The court GRANTS the motion to dismiss filed by 30 of the Issuer Defendants in C07-1549 (Dkt. # 56). The court dismisses the complaints in the following cause numbers without prejudice: C07-1549; C07-1567, C07-1570, C07-1571, C07-1572, C07-1573, C07-1576, C07-1584, C07-1587, C07-1588, C07-1589, C07-1590, C07-1594, C07-1595, C07-1597, C07-1598, C07-1605, C07-1623, C07-1624, C07-1629, C07-1631, C07-1633, C07-1637, C07-1652, C07-1653, C07-1654, C07-1655, C07-1666, C07-1667, C07-1669;
- The court GRANTS the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the remaining 24 cases: C07-1566, C07-1568, C07-1569, C07-1575, C07-

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liaison counsel at oral argument on this issue but liaison counsel did not know why only 30 of the Issuer Defendants joined in the motion.

1577, C07-1578, C07-1579, C07-1580, C07-1581, C07-1582, C07-1583, C07-1585, C07-1593, C07-1626, C07-1627, C07-1628, C07-1630, C07-1632, C07-1634, C07-1635, C07-1636, C07-1638, C07-1668, C07-1670. The court dismisses these complaints with prejudice;

- The court DENIES the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the Issuer Defendants seeking dismissal for lack of subject-matter jurisdiction in Dkt. No. 56 from above. These motions are MOOT in light of the court's ruling on the Issuer Defendants' motion to Dismiss (Dkt. # 56);
- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47) as MOOT;
- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33) as MOOT; and
- The court DENIES the supplemental individual motion to dismiss filed by Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39) as MOOT.

II. BACKGROUND

This case involves Section 16(b) of the Act which prohibits short-swing stock transactions by insiders. It also involves IPOs that took place approximately

10 years ago. Section 16(b) establishes strict liability for insiders (i.e., officers, directors, or beneficial owners of more than ten percent of a companies [sic] stock) who purchase and sell securities within a six-month period. An insider found liable under Section 16(b) must disgorge any profits made from any of these sales and purchases—referred to as "short swing profits." Section 16(b) also contains a demand requirement. The demand requirement sets forth the basis by which a shareholder may obtain standing to sue on behalf of the corporation. The shareholder is required to first demand that the corporation bring the lawsuit; if the corporation declines to bring suit, the shareholder may initiate a derivative suit on behalf of the corporation.

Between October 2 and October 12, 2007, Ms. Simmonds filed 55 separate complaints against the Defendants alleging violations of Section 16(b).[4] The cases were consolidated for pretrial purposes before this court (Dkt. # 2). Ms. Simmonds, a college student, brought the related derivative complaints in her capacity as a shareholder of the Issuer Defendants, all are companies that conducted initial public offerings ("IPOs") between late 1999 and early 2000. (*See, e.g.*, Onvia Compl. (Dkt. # 11) ¶ 9.) The complaints allege that certain investment banks, the Underwriter Defendants, violated Section 16(b)'s prohibition on short-swing transactions because they allegedly profited from aftermarket transactions executed by investors to whom they allocated IPO shares. (*See, e.g., id.* at ¶ 23.) Each complaint is based on similar factual allegations and asserts only one cause of action for violation of Section 16(b).

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[4] One of the 55 cases originally filed, *Simmonds v. Covad*, CV07-1625, was voluntarily dismissed on April 25, 2008 (Dkt. # 18).

The alleged factual basis for each of Ms. Simmonds' complaints is that the Underwriter Defendants colluded with insiders of the Issuer Defendants and certain investors in order to personally profit from underpriced IPOs. (Resp. (Dkt. # 58) at 2 ("The Underwriters' insider status is based upon a recurring pattern of coordinating with key insiders.")) These same allegations appeared in an earlier consolidated case involving these Underwriter Defendants and almost all of the Issuer Defendants, *see In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 293-94 (S.D.N.Y. 2003) ("*In re IPO*") (alleging fraud pursuant to Rule 10b-5 of the Securities Exchange Act of 1934), and in a number of other lawsuits around the country based on other theories of liability arising out of the same or similar allegations. In the *In re IPO* master complaint, the investor plaintiffs allege that the Underwriter Defendants, investment banks entrusted with valuing and underwriting IPOs, orchestrated a vast scheme to defraud the investing public during the late 1990s IPO boom. *Id.* The alleged scheme took place between January 1998 and December 2000 and involved the IPOs of approximately 300 high technology and Internet-related companies. *Id.* The *In re IPO* plaintiffs filed over 1,000 complaints against the Underwriter Defendants and other insiders in 2001, which were later consolidated in *In re IPO. Id.*

The *In re IPO* plaintiffs alleged a fraudulent scheme both far reaching and complex in scope. Even the alleged damage resulting from the scheme is difficult to quantify and involves unwritten understandings relating to profit-sharing between the investment banks and their customers. The crux of the plaintiffs' theory in that case is that the investment banks responsible for underwriting the 1998-2000 IPOs at issue required their investing customers to agree to purchase additional shares of a company's stock in the aftermarket in order to receive shares in the company's IPO. *Id.* at 294. The opportunity to purchase IPO stock was important to the banks' customers because, as alleged by plaintiffs, the average first day gain on an IPO stock was just over 60% for all IPOs during the 1998-2000 period and almost 140% for the specific IPOs at issue in *In re IPO. Id.* at 294 n.2. The In re IPO plaintiffs also allege that some of the investment banks required that their customers pay them a portion of the profits they made by selling the IPO shares in the aftermarket.[5] *Id.* All of the allegations regarding profit-sharing and market manipulation by the investment banks were made public and likely known to most of the shareholders of these companies as early as 2001.

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[5] Judge Scheindlin's February 19, 2003 order on defendants' motion to dismiss in *In re IPO*, 241 F. Supp. 2d 281 (S.D.N.Y. 2003), provides a detailed explanation of the alleged market manipulation and fraudulent scheme surrounding the 1998-2000 IPO market, as well as a historical perceptive on the financial climate leading up to this period.

In the instant case, Ms. Simmonds filed her complaints for short-swing transactions based on the same set of facts as presented in *In re IPO*, albeit under a new theory of liability and almost six years later. Specifically, Ms. Simmonds claims that the Underwriter Defendants are liable for short-swing profits allegedly made in violation of Section 16(b) because the Underwriter Defendants were statutory insiders of the issuing companies and profited from their customers' short-swing transactions that involved stock of the issuing companies. (*See, e.g.*, Onvia Compl. ¶¶ 19-20.)

First, Ms. Simmonds contends that the Underwriter Defendants were statutory insiders because they beneficially owned more than 10 percent of the issuing companies' stock. (*See, e.g., id.* at ¶ 19.) Even if they owned less than 10 percent of the stock directly, she claims that they also shared beneficial interest in stock owned by directors, officers, and other significant shareholders (*i.e.*, insiders) of the issuing companies because they entered into lock-up agreements[6] and agreed to price IPO shares at a small fraction of what they knew to be the likely aftermarket price. (*See, e.g., id.* at ¶¶ 16-17.)

Second, Ms. Simmonds alleges that the purchases and sales involving issuer stock occurred within a period of less than six months by referring to the sales as occurring in the "immediate aftermarket" of the IPO. (*See, e.g., id.* at ¶ 20.) She also notes the large discrepancy between the amount investors paid for the IPO stock and the amount at which the investors sold the stock in the immediate aftermarket. (*See, e.g., id.* at ¶ 18 ("The 9.2 million shares of [issuer] stock sold in connection with its IPO raised $197.7 million for [the issuer] - less than one-third of what buyers paid for [the issuer] shares in the immediate aftermarket.")).

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[6] "These lock-up agreements provided that, subject to limited exceptions, the stockholder could not offer, sell, contract to sell, pledge or otherwise dispose of any Onvia common stock or securities for a period of 180 days after the effective date of the IPO." (Onvia Compl. ¶ 16.)

Third, Ms. Simmonds claims that the Underwriter Defendants had a pecuniary interest in these transactions because they "shar[ed] in the profits of the customers to whom they made IPO allocations of [issuer] stock." (*See, e.g., id.* at ¶ 20.) She also asserts that the Underwriter Defendants allegedly had a pecuniary interest in these short-swing profits because they allocated "shares of [issuer] stock to executives and other high-level insiders of other companies, both private and public, from which [they] expected to receive new or additional investment banking business in return" and created "the opportunity for other [issuer insiders] to derive personal financial benefits from the sale of [issuer] stock into an inflated market, in an effort by [them] to obtain future investment banking business from [the issuer]." (*See, e.g., id.*)

The Defendants move to dismiss Ms. Simmonds' claims on various different theories. Some of the Issuer Defendants joined in a motion seeking to dismiss the complaints against them arguing that (1) Ms. Simmonds lacks standing to pursue these claims because her demand letters were boilerplate and lacked the requisite specificity and (2) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims. The Underwriter Defendants move separately to dismiss the 54 complaints on the following bases: (1) the Underwriter Defendants do not meet the two-prong test for pleading "beneficial ownership;" (2) the allegations that the Underwriter Defendants had a pecuniary interest in the issuer stock are insufficient; (3) Ms. Simmonds fails to plead a specific purchase or sale within a six-month period; (4) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims; (5) the Underwriter Defendants are shielded from Section 16(b) liability by the underwriter's exemption;[7] (6) the Underwriter Defendants are shielded from Section 16(b) liability by the market-making exemption;[8] and (7) Ms. Simmonds fails to plead lack of good faith with particularity. Intersil Corporation ("Intersil") moves to dismiss the complaint against it on the basis that Ms. Simmonds failed to ensure that it received her demand letter. Issuer Defendants Audible Inc. ("Audible") and Packeteer Inc. ("Packeteer") move to dismiss the complaints against them on the basis that both companies were subject to a cash-out merger or acquisition shortly after Ms. Simmonds filed her complaints against them.

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[7] The underwriter's exemption generally provides that "[a]ny purchase and sale, or sale and purchase, of a security that is made in connection with the distribution of a substantial block of securities" is exempt from Section 16 requirements. 17 C.F.R. 240.16a-7.

[8] Section 16(d) provides an exemption for short-swing profits made in the ordinary course of business and incident to market-making activities. 15 U.S.C. § 78p(d). In order to maintain a market for securities not traded on a central exchange, "designated broker-dealers operate as 'market makers' in the over-the-counter markets, buying and selling as principals for their own account rather than as agents for their customers." 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 14.10[2] (4th ed. 2004). Acting as a principal, the market-maker sells stock to investors and buys stock from

III. ANALYSIS

A. Statutory Framework

1. Strict Liability for Short-Swing Profits Under Section 16(b)

Section 16(b) provides that a corporation may recover profits realized by corporate insiders from the purchase and sale of securities that occur inside a six-month period (so-called "short-swing trades"). 15 U.S.C. § 78p(b). Section 16(b) provides, in relevant part:

> For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer ... shall inure to and be recoverable by the issuer, irrespective of any

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investors, often adding a "mark-up" to the price as its compensation. *See Shivangi v. Dean Witter Reyonlds, Inc.*, 825 F.2d 885, 887 (5th Cir. 1987).

> intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security .... Suit to recover such profit may be instituted . . . by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized.

15 U.S.C. § 78p(b).

Should the issuing corporation fail or refuse to bring such suit, a security holder may bring a derivative action on the corporation's behalf. *Id.* The purpose of Section 16(b) is to discourage corporate insiders from taking advantage of their access to non-public information by imposing a flat rule that prohibits an entire category of six-month purchase and sale transactions. ***Foremost-McKesson, Inc. v. Provident Sec. Co.***, 423 U.S. 232, 234 (1976). The statute imposes strict liability on insiders who engage in short-swing trades without regard to the insider's intent. ***Reliance Elec. Co. v. Emerson Elec. Co.***, 404 U.S. 418, 430-31 (1972); ***Morales v. Quintel Entm't, Inc.***, 249 F.3d 115, 121-22 (2d Cir. 2001).

Corporate insiders subject to Section 16(b)'s prohibition of short-swing trading include officers, directors, and "beneficial owners," the latter of which is defined as a "person" holding ten percent of the issuing corporation's securities. 15 U.S.C. § 78p(a). If two or more persons form a "group," each group member may be liable under Section 16(b) if the group's holdings exceed ten percent in the aggregate. 17 C.F.R. § 240.16a-1(a)(1)(2); *see also Rosen v. Brookhaven Capital Mgmt Co., Ltd.*, 113 F. Supp. 2d 615, 618-20 (S.D.N.Y. 2000) (discussing Section 16(b) group liability as borrowed from the group definition for disclosure requirements under Section 13(d), 15 U.S.C. § 78m(d)(3)).

In passing Section 16, "Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public. By trading on this information, these persons could reap profits at the expense of less well informed investors." *Foremost*, 423 U.S. at 243. The ultimate purpose of Section 16 is to prevent the unfair use of information obtained by an insider through his or her relationship to the issuer. 15 U.S.C. § 78p(b). Courts refer to Section 16's provisions as "prophylactic measures" that protect against insider abuse by prohibiting all transactions in which the possibility of abuse is believed to be intolerably great, even if there is no proof of actual abuse. *See Reliance*, 404 U.S. at 422. Although Congress addressed some aspects of insider abuse through other remedies, the scope of Section 16 is not affected by the existence of alternative sanctions. *Foremost*, 423 U.S. at 255.

Under Section 16(b), a corporation, or a security holder via a derivative action, may recover profits realized by an insider subject to Section 16(a). 15 U.S.C. § 78p(b). The action must be brought within two years of the transaction. *Id.* If the insider fails to disclose a covered transaction in the required Section 16(a) reports, the two-year limitation period may be tolled with respect to the non-disclosed transaction. *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 530 (9th Cir. 1981).

In sum, Section 16(b) liability attaches if a plaintiff proves: (1) a purchase, and (2) a sale of securities, (3) by an officer, director, or beneficial owner of more than ten percent of the issuer's securities, (4) within a six-month period. *Gwodzdzinsky v. Zell/Chilmark Fund, L.P.*, 156 F.3d 305, 308 (2d Cir. 1998).

2. Reporting Requirements of Section 16(a)

At the time of the disputed transactions in this case, Section 16(a) required insiders to disclose their initial ownership interests and subsequent changes thereto, within ten days of a transaction. 15 U.S.C. §§ 78p(a)(B)-(C)(2001).[9] Initial statements of ownership interest are reported on Form 3 while changes in ownership interest are reported on Form 4.[10] 17 C.F.R. § 240.16a-3(a). Section 16(a)'s publicity requirement is designed to afford indirect protection against potential misuses of inside information. *Foremost*, 423 U.S. at 255-56. Congress recognized that stockholder trading is also subject to abuse when the size of the stockholder's ownership affords the potential to access corporate information. *Id.* Accordingly, an insider subject to Section 16(a) reporting requirements includes a beneficial owner of more than 10 percent of a class of registered equity securities as well as directors and officers. 15 U.S.C. § 78p(a)(1).

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[9] In 2002, Congress passed the Sarbanes-Oxley Act, which, in part, amended Section 16(a) to now require insiders to electronically disclose changes in their equity interest "before the end of the second day on which the subject transaction has been executed." 15 U.S.C. § 79p(a)(2)(C).

[10] Under Form 4, a beneficial owner subject to Section 16(a) reporting requirements must report *each transaction* in which the owner has a pecuniary interest including the owner's proportionate interest in transactions conducted by another entity. Each transaction must be reported on a separate line. Ownership Reports and Trading By Officers, Directors and Principal Security Holders, SEC Release No. 25254, 48 S.E.C. Docket 216 (February 21, 1991).

B. Issuer Defendants' Motion to Dismiss

The Issuer Defendants move to dismiss 30 of Ms. Simmonds' complaints pursuant to Federal Rule of Civil Procedure 12(b)(1). Rule 12(b)(1) permits the court to dismiss a claim for lack of subject matter jurisdiction based on standing. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). A jurisdictional challenge under this provision may be made on the face of the pleadings or by presenting extrinsic evidence. *Id.* at 1139. When resolving jurisdiction depends on the merits of a case, a court may not resolve genuinely disputed facts. *Id.* Instead, the court must "assume[ ] the truth of the allegations in a complaint ... unless controverted by undisputed facts in the record." *Id.* (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987)). At this stage of pleading, the non-moving party needs only to show that the facts alleged, if proved, would confer standing. *Id.* at 1140 (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998)). Dismissal is only appropriate if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (citing *Conley v. Gibson*, 355 U.S. 41, 44-46 (1957)).

In their joint motion to dismiss, 30 of the Issuer Defendants claim that the demand letters, and the follow-up letters, sent by Ms. Simmonds were inadequate. The Issuer Defendants argue that Ms. Simmonds lacks standing to bring a Section 16(b) action because she failed to sufficiently demand that they bring suit against the Underwriter Defendants before she filed this derivative action. The parties agree that Ms. Simmonds sent letters to the issuing companies' boards of directors demanding that they bring suit under Section 16(b) against the Underwriter Defendants. The moving Issuer Defendants, however, claim that the demands were insufficient because they failed to (1) properly identify company insiders, (2) describe the factual basis of the wrongful acts, and (3) describe the alleged short-swing profits.

Ms. Simmonds argues that the demands were sufficient because she was not required to provide the companies with specific allegations when she was not privy to all the necessary information. Ms. Simmonds further contends that the Issuer Defendants had notice of her theory of the case because she sent follow-up letters that referred to "laddering" and "spinning."[11]

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[11] Laddering is a term used to describe the situation wherein an underwriter induces "investors to give orders to purchase shares in the aftermarket at pre-arranged, *escalating prices* in exchange for receiving IPO allocations." Commission Guidance Regarding Prohibited Conduct in Connection with IPO Allocations, Exchange Act Release No. 34-51500, 70 Fed. Reg. at 19672-01 (April 13, 2005) *Id.*, at 142-43 (internal quotations omitted) (emphasis in original). Spinning refers to

The question of the adequacy of Ms. Simmonds' pre-lawsuit demand is one of standing. Without standing, the court lacks subject-matter jurisdiction over these cases and must dismiss them without reaching the merits. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). But *see Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1042 (9th Cir. 1999) (finding that the district court's assumption of Article III standing did not violate the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits). In this instance because only 30 of the 54 Issuer Defendants attacked Ms. Simmonds' standing and provided sufficient information for the court to evaluate the challenge, the court only considers the standing issue with respect to the moving Issuer Defendants.

1. Adequacy of Demand Letters

The Issuer Defendants claim that Ms. Simmonds failed to meet the demand requirement pursuant to Section 16(b). Although no Ninth Circuit case law directly addresses this point, other federal courts have held that only the issuing corporation has standing to object to any deficiency in, or even the total absence of, a shareholder's demand. *See Dreiling v. Am. Express Travel Related Serv. Co. Inc.*, 351 F. Supp. 2d 1077, 1084 (W.D. Wash. 2004) *rev'd on other grounds*, 458 F.3d 942 (9th Cir. 2006); *see also Colan v. Monumental Corp.*, 524 F. Supp. 1023,

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the underwriters' distribution of IPO shares to high-level insiders of other companies expecting to obtain future underwriting business in return. *See* Hazen, supra, § 6.3[2].

1028 (N.D. Ill. 1981); *Prager v. Sylvestri*, 449 F. Supp. 425, 429 (S.D.N.Y. 1978).

While Section 16(b) creates the requirement for a demand, Federal Rule of Civil Procedure 23.1 is the procedural manifestation of the state law of corporate governance regarding the right of a shareholder to bring a derivative suit on behalf of a corporation. *Dreiling*, 351 F. Supp. 2d at 1085; *Levner v. Al Saud*, 903 F. Supp. 452, 456 (S.D.N.Y. 1994). Rule 23.1 states that the complaint must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority." Fed. R. Civ. P. 23.1. In each of her complaints, Ms. Simmonds describes the demand letters she sent to each of the issuing companies. The substantive question of whether the demand letters are sufficient is governed by the law of the state of incorporation. *Dreiling*, 351 F. Supp. 2d at 1085; *Levner*, 903 F. Supp. at 456. All of the moving Issuer Defendants are incorporated in Delaware.[12]

Under Delaware law, a demand made upon the board of directors must at least "identify the alleged wrongdoer, describe the factual basis of the wrongful acts, the harm caused to the corporation, and request remedial relief." *Dreiling*, 351 F. Supp. 2d at 1085 (quoting *Levner*, 903 F. Supp. at 456). The shareholder generally does not need to specify the legal theory, or every fact in support of that theory, but does need to specify the facts demonstrating the wrongful act. *Levner*, 903 F.Supp. at 456. The court in *Dreiling* found that the demand was substantively sufficient because it provided notice to the issuing company of who the alleged wrongdoers were, what the alleged wrong was, and the requested relief. 351 F. Supp. 2d at 1085. In the demand letter, the plaintiff informed the board that "American Express Company (directly or through it subsidiaries) sold substantial amounts of [the issuing company's] stock from February 25, 2000 through August 24, 2000, thereby violating Section 16(b)'s prohibition against short-swing trading by company insiders" and "demand[ed] that the Board of Directors prosecute claims against American Express Company for violations of Section 16(b)." *Id.* Even though American Express Company had many subsidiaries, the court determined that the shareholder sufficiently identified the wrongdoer, wrongful acts, and company harm in its demand letters. *Id.* Moreover, the court found that the shareholder adequately requested remedial relief by demanding that the board compel the alleged insider to disgorge its profits under Section 16(b). *Id.*

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[12] All of the remaining Issuer Defendants are also incorporated in Delaware except for two Issuer Defendants that are incorporated in California, one that is incorporated in Washington and one in Bermuda.

Similar to the demand letters in *Dreiling*, the demand letters in this case sufficiently identify the alleged wrongdoers by demanding that the issuing company bring suit against its lead IPO underwriters. Unlike the demand letters in *Dreiling*, however, the demand letters here fail to sufficiently identify the factual basis of the wrongful acts, the harm caused to the corporation, and the requested remedial relief. The demand letters sent to the moving Issuer Defendants are nearly identical. The letters describe the alleged wrongful act, damage, and remedial remedy in a single paragraph:

> Notwithstanding the short-swing trading prohibition of Section 16, the group, through its members engaged in purchase and sales of company shares within periods of less than six months during [the one-year relevant period]. Additionally, despite the reporting requirements of Section 16(a), neither the group nor its members filed Section 16(a) reports for these purchase and sale transactions. The group members should therefore be compelled to disgorge the profits they made through the purchase and sales of Company Stock during [the one-year relevant period].

(Issuer's Joint Motion to Dismiss (Dkt. # 56), Ex. D). A few demand letters do identify certain of the Underwriter Defendants involved in the transactions, but describe with similar brevity the alleged wrongful act, damage, and remedial remedy in a single paragraph.

Ms. Simmonds' demand letters do not describe the same alleged wrongdoing that she later describes in her complaints. Unlike American Express in *Dreiling*, the Underwriter Defendants are not alleged to have committed a wrong by merely selling shares they directly owned in less than a six-month period. Instead, in her complaints, Ms. Simmonds contends that the alleged short-swing transactions were not executed by the Underwriter Defendants but by customers to whom the underwriters had allocated IPO shares. She also infers that the alleged damage to the issuing companies was the difference between the amount the shares sold for in the IPO and the amount the shares sold for in the immediate aftermarket. Moreover, according to the complaints, the remedial remedy would be disgorgement of the amount the Underwriter Defendants earned from the customer transactions, and not the customers' profits in their entirety. The demand letters mention none of this and therefore did not put the Issuer Defendants on notice that Ms. Simmonds was demanding that the corporation compel the Underwriter Defendants to disgorge profits they earned when customers to whom they allocated IPO shares sold such shares in the aftermarket.[13]

Ms. Simmonds' demand letters are also insufficient because the factual basis of the alleged wrongful acts is premised upon mere suspicion and lacks the requisite specificity to give the directors a fair opportunity to initiate suit. In *Levner*, the court found that the plaintiff's demand letter was inadequate because it "simply was not adequately particular to alert the [issuing company's] board as to the corporate injury, or the relief sought." 903 F. Supp. at 456. The demand letter in *Levner* set forth the factual basis for the alleged wrongdoing by stating that "[i]n light of [this transfer], plaintiff also requested that [the issuing company] take action with respect to the possibility that [the defendant] was acting on behalf of others in connection with his purported purchase of [the shares]." *Id.* at 455-56. Similarly, Ms. Simmonds bases her complaint on the mere suspicion that the Underwriter Defendants shared in the profit from the shares their customers sold in the immediate aftermarket. Ms. Simmonds' demand letters, however, do not even share this suspicion with the issuing companies. Instead, she states only generally that the Underwriter Defendants made profits from purchases and sales, without providing the particularity that the board would need in order to make an informed decision about whether to bring a lawsuit. "The purpose behind the demand requirement is to give the directors of a corporation the initial opportunity to redress the wrong." *Id.* at 456. Ms. Simmonds' demand letters are completely lacking in the specificity that would give the directors a "fair opportunity to initiate the action, [that she] subsequently undertook," which is the primary purpose of the demand requirement. *Shlensky v. Dorsey*, 574 F.2d 131, 141 (3d Cir. 1978).

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[13] Ms. Simmonds not only fails to identify the remedial nature of her demand but also fails to identify any transaction wherein an Underwriter Defendant shared in the profit of any of its investing customers who sold shares in the aftermarket. The theory is not only novel but based almost entirely on conjecture.

At oral argument on this motion, Ms. Simmonds' counsel suggested that Ms. Simmonds need not provide all the *Levner* information in the demand letter because the information relating to the concerted activity was contained in the SEC complaints and the Issuer Defendants should just "go look in [their] own files" for an explanation of the "Simmonds' theory." (Tr. (Dkt. # 77) at 27 (explaining that the "thing the SEC is unhappy with you about is the set of transactions that forms the basis of our claim.").) Even assuming that telling the corporations to "go look in their own files" to understand the shareholder's theory for a derivative lawsuit is sufficient, Ms. Simmonds nevertheless made no effort to explain to the Issuer Defendants how the conduct that formed the basis of the *In re IPO* litigation also supports a claim for Section 16(b) liability.

When questioned at oral argument regarding the form of relief Ms. Simmonds seeks and whether this relief is explained in the demand letters, Ms. Simmonds' counsel stated that the theory of relief may or may not be described in the demand letters but that, even if it was not, Ms. Simmonds was merely claiming disgorgement of profits. (Tr. at 28.) Ms. Simmonds' counsel then argued that she is simply claiming disgorgement from "short-swing profits from pair trades involving specific purchase and sales [the Underwriter Defendants] know [of] and we don't." (*Id.*) Even this explanation, however, does not adequately explain Ms. Simmonds' theory of relief. As the court interprets her theory, Ms. Simmonds is not claiming the traditional disgorgement of profits from customers who engaged in short-swing trades, but rather disgorgement of profits from underwriters whose clients - who are not insiders - engaged in short-swing trades. Thus, Ms. Simmonds is not seeking disgorgement of the customers' profits from the customer; rather, she seeks disgorgement of profits the underwriters allegedly received from the short-swing trades of their customers. Without analyzing whether this theory is legally cognizable, the court is satisfied that nothing in the demand letters sent to the Issuer Defendants, nor in any of the follow-up letters, explains Ms. Simmonds' multi-layered theory of recovery of profits from short-swing trades.

In her response to the motion to dismiss, Ms. Simmonds points to the additional information that she provided to the issuing companies in follow-up letters. (Resp. (Dkt. # 59) at 8). This additional information, however, only pertains to the "group activity related to 'laddering' and 'spinning' connected to the IPO." (*Id.*) Ms. Simmonds did not provide any further indication to the boards of any of the Issuer Defendants that the purchases and sales that harmed the issuing company were actually made by the Underwriter Defendants' customers. Even considering the additional information provided by Ms. Simmonds, the court finds that Ms. Simmonds failed to give the boards of these companies a sufficient factual basis of the wrongful conduct alleged (*i.e.*, the nature of the purchase and sales), the harm done to the company, or the remedial remedy she seeks. If Ms. Simmonds was simply claiming that the Underwriter Defendants directly owned shares and sold them in violation of Section 16(b), the demand letters would probably suffice. As Ms. Simmonds' complaints illustrate, however, her claims are much more complex and novel, requiring a higher level of specificity to put the boards on notice. Although Ms. Simmonds is correct in arguing that she is not required to identify each specific transaction, she is required to disclose, at minimum, the factual basis for her claims.

Finally, Ms. Simmonds argues that she was not required to make demands upon the issuing companies' boards because such demands would be futile. Under Delaware law, once a shareholder plaintiff makes a demand upon the directors before filing suit, he or she loses the ability to claim demand futility. *Levner*, 903 F.Supp. at 456.

Because Ms. Simmonds' demands are insufficient under Delaware law and Rule 23.1, the court dismisses her complaints without prejudice. The court will not permit Ms. Simmonds to amend her demand letters while pursuing this action. *See Shlensky*, 574 F.2d at 142 (citing *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir. 1973) ("[T]o hold that demands to satisfy Rule 23.1 may be made on the directors *after* a derivative suit has been initiated would be to reduce the demand requirement of the rule to a meaningless formality.")). The purpose of the demand is to afford the corporation the opportunity to address the alleged wrong without litigation, to decide whether to invest corporate resources, and to control any litigation that does occur. It appears to the court when it considers the carbon-copy form of Ms. Simmonds' 54 demand letters, as well as her vague description of the nature of the alleged wrong, that Ms. Simmonds approached the pre-suit demand requirement as a perfunctory task before instituting these actions and pursuing her novel theory of liability. Accordingly, the court must dismiss the complaints against the 30 moving Issuer Defendants without prejudice.[14]

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[14] The remaining 24 Issuer Defendants have not moved to dismiss Ms. Simmonds' complaints for failure to satisfy the pre-suit demand requirement. The court is unable to dismiss the remaining complaints on this basis alone. Although the court may assume that Ms. Simmonds provided the same description of her theory regarding the alleged short-swing transactions to the remaining 24 Issuer Defendants, without something in the record setting forth the extent of information provided to these

C. Underwriter Defendants' Motion to Dismiss

The Underwriter Defendants move to dismiss Ms. Simmonds' claims pursuant to Federal Rule of Civil Procedure 12(b)(6). When considering a motion to dismiss under Rule12(b)(6), the court construes the complaint in the light most favorable to the non-moving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys.*, 135 F.3d 658, 661 (9th Cir. 1998). The court's review of the record on a Rule 12(b)(6) motion is generally limited to the complaint itself. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). The court may, however, rely on facts subject to judicial notice. *States v. Ritchies*, 342 F.3d 903, 908 (9th Cir. 2003). For instance, the court may consider a plaintiff's clarifications in their briefing and at oral argument. *Pegram v. Herdich*, 530 U.S. 211, 230 n.10 (2000) (citing, *Alicke v. MCI Commc'ns Corp.*, 111 F.3d 909, 911 (D.C. Cir. 1997) (citations omitted), in which the court relied on statements in oral argument to clarify complaint).

A court can dismiss an action under Rule 12(b)(6) where the plaintiff fails to allege either a cognizable legal theory or sufficient facts in support of a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). While a complaint need not contain detailed factual

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Issuer Defendants, the court cannot evaluate whether to dismiss the complaints against them for this reason.

allegations, a plaintiff's obligation to provide the grounds entitling him to relief requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Bell Atl. Corp. v. Twombly*, __ U.S. __,127 S. Ct. 1955, 1964-65 (2007) (citations omitted). The complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Id.* Specific facts are not necessary. *Johnson v. Riverside Healthcare Sys.*, 534 F.3d 1116, 1121-22 (9th Cir. 2008) (citations omitted). The complaint need only advise the defendant of what the claim is and the grounds upon which it rests. *Id.* (applying *Twombly* to a complaint alleging a civil rights violation pursuant to 42 U.S.C. § 1981).

As discussed above, the Underwriter Defendants seek to dismiss the remaining 54 complaints on the following bases: (1) the Underwriter Defendants do not meet the two-prong test for pleading "beneficial ownership;" (2) the allegations that the Underwriter Defendants had a pecuniary interest in the issuer stock are insufficient to support a group theory; (3) Ms. Simmonds fails to plead a specific purchase or sale within a six-month period; (4) Ms. Simmonds' claims are time-barred by the two-year statute of limitation for Section 16(b) claims; (5) the Underwriter Defendants are shielded from Section 16(b) liability by the Underwriter's Exemption; (6) the Underwriter Defendants are shielded from Section 16(b) liability by the Market-Making Exemption; and (7) Ms. Simmonds fails to plead lack of good faith with particularity. The court considers the fourth basis—the two-year statute of limitations—dispositive and therefore considers it first.

1. Application of Equitable Tolling

Because only 30 of the 54 Issuer Defendants moved to dismiss Ms. Simmonds' claims based on failure to provide an adequate demand and only the Issuer Defendants have standing to bring such a challenge, the court moves on to address the Underwriter Defendants' motion to dismiss in the remaining 24 cases.

Even though claims under Section 16(b) must be brought within two years after the alleged transaction occurs, the statutory period may be tolled if the beneficial owner fails to report the transaction as required under Section 16(a). *Whittaker*, 639 F.2d 516 at 528. The Underwriter Defendants, as well as the Issuer Defendants, argue that the statute of limitations bars any Section 16(b) claim because the Underwriter Defendants were not subject to Section 16(a) reporting requirements. As discussed further below, the court finds that the Issuer Defendants' shareholders were fully advised of the facts giving rise to Ms. Simmonds' claim well over five years before Ms. Simmonds filed these actions. As such, the court is not persuaded that equity is furthered by tolling the limitations period in these cases.

The Underwriter Defendants contend that the statute of limitations expired because shareholders had the necessary information to assert a Section 16(b) claim more than two years ago. Under the "disclosure" interpretation adopted by the Ninth Circuit, an insider's failure to disclose covered transactions in the required Section 16(a) reports tolls the two-year limitations period connected with such a non-disclosed transaction. *Whittaker*, 639

F.2d at 527. In *Whittaker*, the Ninth Circuit held that the period beings [sic] to run when the transactions are disclosed in the insider's Section 16(a) report. *Id.* The Ninth Circuit rejected the more lenient "notification" approach which triggers the running of the two-year period once the corporation (and thus indirectly the shareholders) has sufficient information to put it on notice of its Section 16(b) claims. *Id.* at 529. Instead, it adopted the disclosure interpretation, in part, to ensure notification to shareholders, but also to recognize Congress' goal "to impose absolute accountability within clearly demarcated boundaries" under Section 16. *Id.*

> This goal of clear boundaries is served by a limitations period which can be mechanically calculated from objective facts. The dates on which purchases and sales are made are such facts, as are the dates on which Section 16(a) reports are filed with the SEC. By contrast, under the notice interpretation, the running of the limitations period would depend on uncertain determinations of what knowledge should lead a corporation to discover its cause of action. Thus, the disclosure interpretation better serves the statute's purpose than the notice interpretation.

Id.

More recently, the Second Circuit allowed the statutory limitations period to run until the company (and shareholders) received actual notice "tantamount to a Form 4" regarding a transaction. *Litzler v. CC Invs. L.D.C.*, 362 F.3d 203, 208 (2d Cir. 2004). In adopting an actual notice standard, the Second Circuit recognized that requiring actual notice created uncertainty with respect to otherwise long-settled transactions. *Id.* at 208 n.5. It nevertheless concluded that actual notice better served the goals of Section 16 because it neither required identifying "circumstances in which a person would or should have realized the non-compliance" nor relied on "the ability of a shareholder or company to piece together the substance of a Form 4 from disparate sources of information." *Id.* at 208. The Second Circuit did not divorce equitable tolling from justifiable circumstances completely, however. *Id.* (stating that "[a]ssuming the circumstances are found to justify equitable tolling in this case" then tolling would end on the date by which the plaintiff received actual notice of the claim). Judge Jacobs, writing for the Second Circuit in *Litzler*, cautioned in a footnote that allowing the statute of limitations to be tolled solely because a defendant failed to file Section 16(a) reports would result in indefinite liability, thereby "affect[ing] long-settled transactions [that] might hang forever over honest persons." *Id.* at 208 n.5.

Here, unlike *Whittaker* and other cases employing the equitable tolling doctrine in Section 16(b) cases, there is no dispute that all of the facts giving rise to Ms. Simmonds' complaints against the Underwriter Defendants were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed. The only recent development giving rise to these claims is Ms. Simmonds' acquisition of shares in the 54 Issuer Defendants' companies. Of note, there is no dispute that the shares were acquired at the direction of Ms. Simmonds' father who is a securities lawyer with experience in Section

16(b) litigation. While the court need not consider the steps taken in attempting to establish standing in these cases to determine whether equitable tolling is appropriate, the court does rely on the fact that the only significant development occurring within the last two years was Ms. Simmonds' acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed. This leads the court to seriously question the application of principles of equity to the cases before it.

The definition of equity, *i.e.*, the "recourse to principles of justice to correct or supplement the law as applied to particular circumstances" or the "body of principles constituting what is fair and right," persuades the court that equitable tolling does not apply to the situation before it. BLACK'S LAW DICTIONARY 579 (8th ed. 2004); *see also U.S. ex rel. Hyatt v. Northrup Corp.*, 91 F.3d 1211, 1216 (9th Cir. 1996) (explaining that equitable tolling is read into every federal statute and that the rationale behind tolling requires that the statute of limitations start to run when the plaintiff acquires knowledge of the wrongful activity). The court indicated its hesitation to apply these principles to Ms. Simmonds' complaints at oral argument. Ms. Simmonds' counsel responded that the court could simply give the doctrine another name. (Tr. at 34.) Changing the nomenclature, however, does not change the court's conclusion that tolling is not appropriate in this case.

While the *Whittaker* court adopted a bright-line test for determining whether a "disclosure" by an insider of the corporation has been made in order to determine the tolling of the statute, the ***Whittaker*** decision does not resolve whether the statute should be tolled in this case. In ***Whittaker***, the court was faced with a much different factual situation. The defendant in ***Whittaker***, William Whittaker, was a corporate insider of Whittaker Corporation as was his mother, Beuleh Whittaker. ***Whittaker***, 639 F.3d at 518. Mr. Whittaker failed to disclose to the corporation that he had total control over the shares owned by his mother and was thus a beneficial owner of her shares. *Id.* at 523. When the corporation learned the full extent of Mr. Whittaker's control over his mother's shares it compiled a list of short-swing trades using both accounts. *Id.* at 519. It then demanded payment from Mr. Whittaker of the profits he realized from the short-swing trades. *Id.* Mr. Whittaker paid the demand and then sued for a declaration of nonliability under Section 16 and to recover the money he paid. *Id.*

The district court in Whittaker held that Mr. Whittaker was liable for short-swing trades but only those made during the statutory two-year period, which cut out a substantial portion of the corporation's recovery—almost four years of trades were eliminated. *Id.* The Ninth Circuit, under those facts, held that the two-year period was tolled, essentially indefinitely, until Mr. Whittaker filed his Form 4. *Id.* at 530. The Ninth Circuit reasoned that it was providing "absolute accountability within clearly demarcated boundaries." *Id.* This reasoning does not apply in this case. Here, there are no "demarcated boundaries" because the novelty of Ms. Simmonds' theory neither gives the insiders sufficient notice of the possibility of having to file a

Form 4 (*i.e.*, the underwriters should have known that allocating IPO shares to their best customers in return for more business could lead to Section 16(b) liability) nor does it provide any end date of liability for the issuing companies or the underwriters.[15] Indeed, Ms. Simmonds' counsel acknowledged that under her theory she could buy stocks in companies who had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock. The court is not persuaded that permitting shareholders to go back 20 years with novel claims for Section 16(b) liability would further the congressional intent of the statute. Accordingly, the court does not apply equitable tolling to Ms. Simmonds' claims.

IV. CONCLUSION

For the reasons stated, the court GRANTS in part and DENIES in part the motions before it. The court GRANTS the motion to dismiss filed by 30 of the Issuer Defendants in C07-1549 (Dkt. # 56) without prejudice. The court GRANTS the omnibus motion to dismiss filed by the Underwriter Defendants in C07-1549 (Dkt. # 57) as to the remaining 24 cases. The court dismisses these complaints with prejudice. The remaining motions are DENIED as MOOT: the supplemental individual motion to dismiss filed by Issuer Defendant Intersil Corporation in C07-1572 (Dkt. # 47); the supplemental individual motion to dismiss filed by Issuer Defendant Audible Inc. in C07-1623 (Dkt. # 33); and the supplemental individual motion to dismiss filed by Issuer Defendant Packeteer Inc. in C07-1654 (Dkt. # 39).

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[15] The court questioned whether Ms. Simmonds was claiming that she was not "on notice" of the claim because the Underwriter Defendants had not filed their Form 4. Ms. Simmonds' counsel candidly responded that he did not know the answer to that question. He then went on to explain that if she is considered to be on notice, he would go out and find a plaintiff that was not on notice. (Tr. at 32.) This exchange accurately reveals the incongruent result when the bright-line rule set forth in Whittaker is applied to the facts in this case. Until such time as the Underwriter Defendants file a Form 4—essentially admitting liability—the statute is tolled forever.

Dated this 12th day of March, 2009.

/s/
JAMES L. ROBART
United States District Judge

PERTINENT STATUTORY PROVISIONS

Section 16 of the Securities Exchange Act of 1934 provides in relevant part:

> **Directors, officers, and principal stockholders**
>
> **(a) Disclosures required**
>
> **(1) Directors, officers, and principal stockholders required to file**
>
> Every person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file the statements required by this subsection with the Commission (and, if such security is registered on a national securities exchange, also with the exchange).
>
> **(2) Time of filing**
>
> The statements required by this subsection shall be filed—
>
> **(A)** at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l*(g) of this title;
>
> **(B)** within 10 days after he or she becomes such beneficial owner, director, or officer;
>
> **(C)** if there has been a change in such ownership, or if such person shall have purchased or sold a security-based swap agreement (as defined in section 206(b) of the

Gramm-Leach-Bliley Act (15 U.S.C. 78c note)) involving such equity security, before the end of the second business day following the day on which the subject transaction has been executed, or at such other time as the Commission shall establish, by rule, in any case in which the Commission determines that such 2-day period is not feasible.

(3) Contents of statements

A statement filed—

(A) under subparagraph (A) or (B) of paragraph (2) shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

(B) under subparagraph (C) of such paragraph shall indicate ownership by the filing person at the date of filing, any such changes in such ownership, and such purchases and sales of the security-based swap agreements as have occurred since the most recent such filing under such subparagraph.

(4) Electronic filing and availability

Beginning not later than 1 year after July 30, 2002—

(A) a statement filed under subparagraph (C) of paragraph (2) shall be filed electronically;

(B) the Commission shall provide each such statement on a publicly accessible Internet site not later than the end of the business day following that filing; and

(C) the issuer (if the issuer maintains a corporate website) shall provide that statement on that corporate website, not later than the end of the business day following that filing.

(b) Profits from purchase and sale of security within six months

For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) or a security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involving any such equity security within any period of less than six months, unless such security or security-based swap agreement was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security or security-based swap agreement purchased or of not repurchasing the security or security-based swap agreement sold for a period exceeding six months. Suit to recover such profit may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; but no such suit shall be brought more than two years after the date such profit was realized. This subsection shall not be construed to cover any transaction where such beneficial owner was not such both at the time of the purchase and sale, or the sale and purchase, of the security or security-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act) involved, or any transaction or transactions which the Commission by rules and regulations may exempt as not comprehended within the purpose of this subsection.

15 U.S.C. § 78p.

OPPOSITION
BRIEF

No. 10-1261

In the Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,
Petitioners,

v.

VANESSA SIMMONDS,
Respondent.

IN RE SECTION 16(b) LITIGATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI*

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This appeal relates to the appeal previously docketed as No. 10-1218

May 12, 2011

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QUESTION PRESENTED

Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b) ("Section 16(b)"), is the only statute enacted by Congress that directly targets insider trading. Congress designed Section 16(b) to promote the public's interest in preserving the integrity of United States financial markets. Section 16(b) is a strict liability scheme. It requires statutory insiders to disgorge profits from short-swing transactions in publicly-traded issuer securities. Congress gave exclusive enforcement authority of Section 16(b) to issuers and their shareholders. It also prescribed a two-year statute of limitations.

Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(a) ("Section 16(a)"), requires statutory insiders to disclose short-swing trading activity in reports filed with the United States Securities and Exchange Commission. These reporting obligations are an integral part of Section 16 enforcement. The information insiders are required to disclose constitutes the main source—typically the only source—of information for the suits Congress authorized shareholders to bring under Section 16(b).

The question presented is: does Section 16(b)'s two-year statute of limitations begin to run if the targeted insider has failed to comply with its Section 16(a) reporting obligations?

LIST OF PARTIES

Pursuant to Rule 14.1(b), below is a list of all parties in the court whose judgment is the subject of this petition:

Plaintiff/Respondent

1. Vanessa Simmonds

Defendants/Petitioners ("Underwriters")

1. Credit Suisse Securities (USA) LLC
2. Goldman Sachs & Co.
3. J.P. Morgan Securities Inc.
4. Merrill Lynch, Pierce, Fenner & Smith Incorporated
5. Bank of America Corporation
6. Robertson Stephens, Inc.
7. Deutsche Bank Securities Inc.
8. Morgan Stanley & Co. Incorporated
9. Citigroup Global Markets, Inc.
10. Bear, Stearns & Co., Inc.
11. Lehman Brothers Inc.

Nominal Parties ("Moving Issuers")

1. Onvia, Inc.
2. Finisar Corporation
3. Ariba, Inc.
4. Akamai Technologies, Inc.
5. Intersil Corporation
6. Avici Systems, Inc.
7. Tivo, Inc.
8. Selectica, Inc.
9. Red Hat, Inc.
10. Vignette Corporation
11. Sycamore Networks, Inc.

12. Silicon Laboratories Inc.
13. Maxygen, Inc.
14. The Street.com, Inc.
15. Sonus Networks, Inc.
16. Priceline.com Incorporated
17. Martha Stewart Living Omnimedia, Inc.
18. Audible, Inc.
19. Capstone Turbine Corporation
20. CoSine Communications, Inc.
21. Perot Systems Corporation
22. AsiaInfo Holdings, Inc.
23. Saba Software, Inc.
24. Digimarc Corporation
25. InterNAP Network Services Corporation
26. Packeteer Inc.
27. Aspect Medical Systems, Inc.
28. NaviSite, Inc.
29. Oplink Communications, Inc.
30. Occam Networks, Inc.

Nominal Parties ("Non-Moving Issuers")

1. Foundry Networks, Inc.
2. Avanex Corporation
3. Turnstone Systems, Inc.
4. Silicon Image, Inc.
5. Juniper Networks
6. Kana Software, Inc.
7. Interwoven, Inc.
8. Openwave Systems, Inc.
9. Informatica Corporation
10. Critical Path, Inc.
11. SourceForge, Inc.
12. Concur Technologies, Inc.
13. Palm, Inc.
14. Brocade Communications Systems, Inc.
15. Microtune, Inc.

16. Extreme Networks, Inc.
17. InsWeb Corporation
18. Marvell Technology Group Ltd.
19. Keynote Systems, Inc.
20. Tibco Software Inc.
21. Transmeta Corporation
22. Airspan Networks, Inc.
23. OmniVision Technologies, Inc.
24. Immersion Corporation

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STATUTORY PROVISION INVOLVED

15 U.S.C § 78p(a), (b)
Section 16 of the Securities Exchange Act of 1934

Section 16. Directors, officers, and principal stockholders

(a) Disclosures required

(1) Directors, officers, and principal stockholders required to file

Every person who is directly or indirectly the ***beneficial owner*** of more than 10 percent of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a ***director*** or an ***officer*** of the issuer of such security, shall file the statements required by this subsection with the Commission.

* * *

(3) Contents of statements

A statement filed--

(A) . . . shall contain a statement of the amount of all equity securities of such issuer of which the filing person is the beneficial owner; and

(B) . . . shall indicate ownership by the filing person at the date of filing, any such changes in

> such ownership, and such purchases and sales of the security-based swap agreements as have occurred since the most recent such filing under such subparagraph.

* * *

(b) Profits from purchase and sale of security within six months

> For the purpose of preventing the unfair use of information which may have been obtained by ***such beneficial owner, director, or officer*** by reason of his relationship to the issuer, ***any profit realized by him*** from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall inure to and be recoverable by the issuer, irrespective of any intention on the part of ***such beneficial owner, director, or officer*** in entering into such transaction . . . . Suit to recover ***such profit*** may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; ***but no such suit shall be brought more than two years after the date such profit was realized***.

(Emphasis added).

STATEMENT OF THE CASE

I. BACKGROUND ON SECTION 16

A. Congress Sought "to Curb the Evils of Insider Trading" and Protect the Integrity of United States Financial Markets Through Exclusive Private Enforcement of Section 16(b).

Section 16(b) of the Securities Exchange Act of 1934 ("the Act") is the only federal statute enacted by Congress specifically "to curb the evils of insider trading." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972). The statute "imposes a strict prophylactic rule with respect to [statutory] insider, short-swing trading." *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251 (1976). Statutory insiders include officers, directors, and shareholders with more than a 10 percent interest in the issuing company. 15 U.S.C. § 78p(b). The latter may be formed by a "group" that collectively owns more than 10 percent of an issuer's securities. *Roth v. Jennings*, 489 F.3d 499, 510-16 (2d Cir. 2007).

Statutory insiders are "presumed to have access to inside information." *Foremost-McKesson*, 423 U.S. at 243. When they profit from trades in publicly-traded issuer stock within any six month period ("short-swing trading"), the insiders must disgorge their profits to the issuer. 15 U.S.C. § 78p(b); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973).

Congress did ***not*** give the United States Securities and Exchange Commission ("SEC") ***any*** role in enforcing Section 16(b). *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Congress permitted only private enforcement and relies on private attorneys to spearhead that effort:

> Congress left enforcement of section 16(b) cases to shareholders and consequently to the attorneys who find such cases and represent the shareholders who consent to be plaintiffs. The SEC was given no role in enforcing section 16(b). Thus, section 16(b) can be enforced and the market's integrity can be protected, only if attorneys are willing to invest the time and energy, and assume the risk, that is involved in investigating numerous SEC filings in the search to uncover insiders who make improper short swing profits, and filing lawsuits against those unwilling to return such profits.

Klein v. Salvi, No. 02 Civ. 1862 (AKH), 2004 WL 596109, at *10 (S.D.N.Y. Mar. 30, 2004), *aff'd*, 2004 WL 2931121 (2d Cir. 2004).

B. Section 16(b) Enforcement Requires Section 16(a) Disclosure.

Section 16(a) is integral to Section 16(b) enforcement. Section 16(a) requires insiders to publicly disclose their short-swing securities transactions in order to combat the practices Congress enacted Section 16(b) to prevent. 15 U.S.C. § 78p(a). As described by the SEC:

> Section 16 . . . was designed to provide the public with information on insider securities transactions and holdings and to deter insiders

> from profiting on short term trading transactions in the securities of their corporations on the basis of undisclosed information. The section was enacted primarily in response to abuses, described in detail in the legislative history of the Exchange Act, where insiders with advance knowledge of facts which would produce a rise or fall in the market value of securities of their companies bought and sold such securities as the circumstances warranted to their personal advantage. On occasion, insiders actually manipulated the market price of their stock by causing a corporation to follow financial policies calculated to produce sudden changes in market prices in order to obtain short swing profits. To combat these practices, Congress enacted Section 16 to require reports of securities transactions by insiders and to provide for the recovery of any short swing profits.

Interpretive Release on Rules Applicable to Insider Reporting and Trading, 46 Fed. Reg. 48147-01 (Oct. 1, 1981) (footnotes omitted); *see also Gollust*, 501 U.S. at 121 (describing purpose of Section 16(b) as ensuring "maintenance of fair and honest markets" through elimination of profits from insider, short-swing trading); *Foremost-McKesson*, 423 U.S. at 243-44 (same); *Kern County Land*, 411 U.S. at 592 (same; setting out legislative history).

The "reports" to which the SEC refers are commonly known as "Section 16(a) reports." "The disclosures and reports of § 16(a) are an integral part of the context of § 16 within which § 16(b) must be read." *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 528

(9th Cir. 1981). The information in Section 16(a) reports is the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Id.*; *see also Litzler v. CC Invs., L.D.C.*, 362 F.3d 203, 207 (2d Cir. 2004) ("The prophylaxis of Section 16 works by imposing an absolute duty of disclosure" through Section 16(a) reporting). The drafters of Section 16(b) "clearly thought" that the Section 16(a) disclosure requirements also "would afford indirect protection against some potential misuses of insider information." *Foremost-McKesson*, 423 U.S. at 255-56, 257 n.31 (citing legislative history).

Section 16(a) reports contain, *inter alia*, short-swing trading and group membership details. The reports require statutory insiders to disclose:

- The identity of the reporting person.
- Whether the reporting person is an officer, director, or 10 percent shareholder.
- Whether the reporting person is filing individually or as part of a "group."
- The dates of the reported short-swing trades.
- The amounts, prices, and nature of the securities acquired, disposed of, or beneficially owned.

See Appendix A (blank Section 16(a) report); 15 U.S.C. § 78p(a). Section 16(a) reports allow the examining shareholder to discover and isolate the dates of the trades at issue, mathematically compute the short-swing profits to be disgorged, identify the statutory insiders as individuals or groups, and pinpoint the shares in which the insiders have or share "a direct or indirect pecuniary interest." 17 C.F.R. § 240.16a-1(a)(2). Without Section 16(a) reports, outsiders, like Respondent, have no access to this specific short-swing profit and other claim-related information.

None of the targeted insiders in these cases filed Section 16(a) reports. Nor have they ever publicly disclosed Section 16(a) information in any other manner.

II. STATEMENT OF FACTS

A. Respondent's Claim

The investment bank Petitioners ("Underwriters") that served as lead underwriters of initial public offerings ("IPOs") of nominal party issuers ("Issuers") reaped extraordinary profits through short-swing, insider trading of Issuer IPO stock. From 1998 through 2000, the stock market experienced a surge of "hot" IPOs. In these IPOs, demand for stock far exceeded the supply offered, resulting in significantly higher aftermarket prices. SEC and other governing body rules require underwriters to make a complete distribution of IPO shares at the IPO price. Underwriters are prohibited from deriving financial gain from increases in aftermarket prices of hot IPO stocks. They cannot allocate shares to themselves, and shares allocated after trading commences at a higher price must be distributed at the IPO price.

Underwriters distributed IPO shares to the market and controlled who received hot IPO allocations. In doing so, they distributed what were essentially instant, risk-free profits. For example, an investor receiving an IPO allocation of Issuer SourceForge, Inc. stock (formerly VA Linux) at its IPO price of $30 per share on the morning of December 9, 1999, realized a ten-fold profit when VA Linux shares opened for public trading later that morning at $299 per share.

Underwriters, together with Issuer insiders, shared in these profits. Underwriters demanded kickbacks of profits from customers who received allocations of hot IPOs and "flipped" (immediately sold) the shares at significantly higher aftermarket prices. Underwriters disguised their profit-sharing arrangements because they were illegal. In a complaint filed against Underwriter Credit Suisse First Boston ("CSFB"), the SEC explained:

> In exchange for shares in "hot" IPOs, CSFB wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock. From at least April 1999 through June 2000, CSFB employees allocated shares of IPOs to over 100 customers who were willing to funnel between 33 and 65 percent of their profits to CSFB. The profits were channeled to CSFB in the form of excess brokerage commissions generated by the customers in unrelated securities trades that the customers generally affected solely to satisfy CSFB's demands for a share of the IPO profits.

To increase the profit potential of hot IPOs, Underwriters and Issuer insiders engaged in what the SEC refers to as "laddering." They agreed to underprice hot IPO shares—to the detriment of the

IPO issuer—and required recipients of IPO allocations to "ratchet up" the stock price in the aftermarket by buying additional shares at progressively higher prices.[1] This conduct is prohibited.

Issuer insiders also personally benefited from underpricing and laddering schemes. Issuer insiders allocated underpriced IPO shares to themselves, friends, and family members. Like Underwriters, laddering allowed insiders to profit from sales at inflated prices.

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[1] Academics refer to underpricing as "money left on the table"—money issuers could have raised in an IPO. Tim Loughran & Jay Ritter, *Why Has IPO Underpricing Changed Over Time?*, 33 FIN. MGMT. 5, 6 (Autumn 2004). The targeted insiders in this appeal profited substantially from the conducted alleged. The 54 IPOs at issue generated over $7 billion in proceeds for Issuers, but left over $15 billion "on the table." This makes them among the most egregious examples of IPO underpricing. *See generally* Jay Ritter, *Money Left on the Table in IPOs by Firm* (Mar. 19, 2008), *available at* http://bear.warrington.ufl.edu/ritter/moneyonthetablebyfirm.pdf. The phenomenon of intentionally underpricing IPOs has generated a tremendous amount of recent scholarship, essentially all of which supports the thesis underlying Respondent's Section 16(b) claim. *See generally* Xiaoding Lui & Jay R. Ritter, *Corporate Executive Bribery: An Empirical Analysis* (Dec. 4, 2007), *available at* http://bear.warrington.ufl.edu/ritter/work_papers/BriberyDec42007.pdf; J. Griffin et al., *Why are IPO Investors Net Buyers Through Lead Underwriters?*, 85 J. FIN. ECON. 518 (2007); Stephen J. Choi & A.C. Pritchard, *Should Issuers be on the Hook for Laddering? An Empirical Analysis of the IPO Market Manipulation Litigation*, 73 U. CIN. LAW REV. 179 (2004); Tim Loughran & Jay Ritter, *Why Don't Issuers Get Upset About Leaving Money on the Table in IPOs?*, 15 REV. FIN. STUD. 413 (2002). These articles cite, and are cited by, many others supporting the same or related propositions.

Underwriters and Issuer insiders worked together to underprice IPOs and drive up aftermarket stock prices as part of a common objective that involved acquiring, holding, and disposing of Issuer shares. They thereby formed groups that collectively owned more than 10 percent of an issuer's stock, establishing the Underwriters' status as statutory insiders under Section 16(b). As statutory insiders, Underwriters profited from short-swing transactions in Issuer shares. Pursuant to Section 16(b), these insiders must disgorge the profits generated from the short-swing purchases and sales of Issuer shares in which they had a direct or indirect pecuniary interest.

B. Insiders' Failure to Disclose Section 16(a) Information

Underwriters do not, and cannot, point to any evidence that they have ever disclosed Section 16(a) information. Underwriters have never filed Section 16(a) reports. They assert each IPO at issue here was fully "challenged" in the *IPO* litigation. Pet. at 8. However, no other litigation, including the *IPO* litigation, has addressed or released Respondent's Section 16(b) claims. Underwriters also do not, and cannot, point to any evidence that the *IPO* or other litigation revealed the targeted insiders' short-swing profits and other information required to be disclosed in Section 16(a) reports.

Respondent—through an extensive investigation on the part of her attorneys—nevertheless "piece[d] together" the framework of a Section 16(b) claim "from disparate sources of information."[2] *Litzler*, 362 F.3d at 208. One source of information included academic and financial research and literature published in just the last few years. *See supra* note 1. These articles posited, albeit only generally, what Respondent determined was coordinated conduct among Underwriters and Issuer insiders to obtain huge, risk-free profits by disguising their beneficial ownership in Issuer securities traded on the short-swing. *See id.* Their uniform conduct gives rise to the Section 16(b) violations on which these cases are based. The targeted insiders' actual short-swing trading details, however, remain publicly unknown ***to this day***. This is for one reason only: the insiders have continued to conceal this core Section 16(a) information.

Financial economists have continued their quest to understand the IPO underpricing phenomenon long after Respondent researched, investigated, and filed her Section 16(b) claims. In the May 2010 edition of Oxford University's *The Review of Financial Studies*, Professors Xiaoding Liu and Jay R. Ritter note that their analysis of underwriters' allocation of underpriced "hot" IPO shares to issuer insiders between 1996 and 2000, which were later "spun" for quick profit, has been a long and painstaking process "***mainly due to the lack of data***." Xiaoding Lui &

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[2] This stands in stark contrast to how Congress designed Section 16 to operate. "Section 16 compels disclosure through a [Section 16(a) report] that is so clear that an insider's short-swing profits will be discovered without ***any*** investigation other than the putting together of two and two. The prophylaxis of Section 16 works by imposing an absolute duty of disclosure upon insiders, officers, and the other parties covered by its obligations." *Litzler*, 362 F.3d at 208 (citation omitted) (emphasis added).

Jay R. Ritter, *The Economic Consequences of IPO Spinning*, 23 REV. FIN. STUD. 2024, 2025 (2010) (emphasis added). Professors Liu and Ritter had previously presented their conclusions in September 2009 at the Harvard Law School Forum on Corporate Governance and Financial Regulation. Their conclusions fully support the analytical framework of the Section 16(b) complaints Respondent filed two years earlier.

C. Respondent's Complaint and District Court Consolidation

Respondent issued demands to each Issuer as required by Section 16(b). None of the statutory insiders, however, had filed Section 16(a) reports—the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Whittaker*, 639 F.2d at 528. Respondent, therefore, had no access to the short-swing trading and group membership details.

Respondent commenced litigation when no Issuer filed suit within 60 days after her demand. She filed 55 lawsuits in the United States District Court for the Western District of Washington (Seattle) in October 2007. All 55 suits alleged Section 16(b) violations stemming from the uniform business practices adopted and repeatedly employed by the 11 Underwriter defendants as described above.[3] The district court's subject matter jurisdiction was based on Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. The district court reassigned all the actions to a single judge and coordinated the cases for pretrial purposes.

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[3] There were hundreds of IPOs in which the Underwriters engaged in the same misconduct. The 55 cases Respondent filed represent the clearest and most egregious examples.

III. DECISION OF THE DISTRICT COURT

Underwriters filed an omnibus Federal Rule of Civil Procedure 12 motion to dismiss. They asserted that Respondent's claims were time barred by operation of Section 16(b)'s two-year statute of limitations. Although the beneficiaries of any recovery, 30 of the then 54 issuers ("Moving Issuers")[4] also filed a joint motion to dismiss. Like Underwriters, Moving Issuers asserted that Respondent's claims were time barred. They also asserted, however, that Respondent served factually inadequate pre-suit demands. On March 12, 2009, the district court granted the motions on both statute of limitations and pre-suit demand grounds, and entered judgment against Respondent.

IV. DECISION OF THE NINTH CIRCUIT

Respondent appealed the district court decision to the Ninth Circuit Court of Appeals, invoking the court's appellate jurisdiction under 28 U.S.C. § 1291. The Ninth Circuit reversed the statute of limitations dismissal. Following its long-standing *Whittaker* precedent, the Ninth Circuit held that the two-year statute of limitations in Section 16(b) does not begin to run until the insider discloses its transactions in a Section 16(a) report.[5]

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[4] Respondent voluntarily dismissed one of the 55 cases after the issuer involved was taken private and, as a result, Respondent lost standing to maintain the Section 16(b) action. *See Gollust*, 501 U.S. at 125-26 (explaining Section 16(b) standing requirements).

Despite the insiders' noncompliance with Section 16(a)'s reporting obligations, the Ninth Circuit affirmed the district court's ruling that Respondent's demand was insufficient and that Respondent could not argue demand futility. The Ninth Circuit also, *sua sponte*, "converted" those dismissals "without prejudice" to dismissals "with prejudice"—and did not permit leave to amend on remand. The propriety of the Ninth Circuit's decision on pre-suit demand issues is the subject of Respondent's separately-filed Petition for Writ of Certiorari that this Court placed on the docket April 7, 2011, as No. 10-1218.

REASONS FOR DENYING THE PETITION

The Ninth Circuit decision does not represent the first time a federal court has addressed whether the failure to report under Section 16(a) tolls the two-year limitations period in Section 16(b). Numerous federal courts throughout the country have considered the issue. *See, e.g.*, *Litzler v. CC Invs., L.D.C.*, 362 F.3d 203, 207 (2d Cir. 2004); *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981); *Capitol First Corp. v. Todd*, No. 04-6439 (MLC), 2006 WL 3827329 (D.N.J. Dec. 27, 2006); *Dreiling v. Am. Online, Inc.*, No. C05-1339JLR, 2005 WL 3299828 (W.D. Wash. Dec. 5, 2005); *Segen v. Comvest Venture Partners, LP*, No.

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[5] Moving Issuers, like Underwriters, argued for dismissal on statute of limitations grounds at the Ninth Circuit. However, Moving Issuers, unlike Underwriters, have not petitioned this Court for a writ of certiorari on this issue. Nor have Moving Issuers joined in Underwriters' petition. *See* S. Ct. R. 12(4).

Civ.A. 04-822 JJF, 2005 WL 1320875 (D. Del. June 2, 2005); *Tyco Int'l Ltd. v. Kozlowski*, No. MDL 02-1335-B, Civ. 03-CV-1339-PB, 2005 WL 927014 (D.N.H. Apr. 21, 2005); *Dreiling v. Am. Express Travel Related Servs. Co., Inc.*, 351 F. Supp. 2d 1077 (W.D. Wash. 2004); *Rosen ex rel. Egghead.com, Inc. v. Brookhaven Capital Mgmt., Co., Ltd.*, 179 F. Supp. 2d 330 (S.D.N.Y. 2002); *Morales v. Executive Telecard, Ltd.*, No. 95 Civ. 10202(KMW), 1998 WL 314734 (S.D.N.Y. June 12, 1998); *Shattuck Denn Mining Corp. v. La Morte*, No. 67 Civ. 3222, 1974 WL 373 (S.D.N.Y. Mar. 8, 1974); *Blau v. Albert*, 157 F. Supp. 816 (S.D.N.Y. 1957); *Carr-Consol. Biscuit Co. v. Moore*, 125 F. Supp. 423 (M.D. Pa. 1954); *Grossman v. Young*, 72 F. Supp. 375 (S.D.N.Y. 1947); *Dreiling v. Kellett*, No. C01-1528P (Dkt. 114) (W.D. Wash. Feb. 14, 2003) (denying defendants' summary judgment motion).

With only one exception,[6] each of these courts reached the same conclusion as the Ninth Circuit did: the statute of limitations for Section 16(b) claims does not begin to run if Section 16(a) information has not been disclosed. As discussed below, the Ninth and Second circuits are not split on the issue, and the substantially uniform holdings of all the above federal cases are not in conflict with any decision from this Court.

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[6] The one exception is the *Carr-Consolidated Biscuit* district court case from 1954. However, as noted by the Ninth Circuit 27 years later, the court in *Carr-Consolidated Biscuit* relied on a theory about statutes of limitations that was subsequently "discarded" and "renounced" by courts including this Court. *Whittaker*, 639 F.2d at 529 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556-59 (1974)). Other courts have similarly declined to follow *Carr-Consolidated Biscuit* on the issue. *See, e.g.*, *Capitol First Corp.*, 2006 WL 3827329 at *11.

I. THERE IS NO RELEVANT SPLIT OF AUTHORITY BETWEEN THE SECOND AND NINTH CIRCUITS.

A. Both *Litzler* and *Whittaker* Toll Section 16(b)'s Statute of Limitations When the Insider Has Failed to Report Under Section 16(a).

The Second Circuit in *Litzler* and the Ninth Circuit in *Whittaker* are not divided in any way material to this litigation. Both cases hold that the two-year limitations period in Section 16(b) is tolled when the targeted insider has failed to file the required Section 16(a) report. *Compare Litzler*, 362 F.3d at 207-08 ("We now hold that tolling of the limitations period in Section 16(b) . . . is appropriate when a defendant has failed to comply with the reporting requirements of Section 16(a). . . . We hold that the incentives of Section 16 are best served if tolling is triggered by noncompliance with the disclosure requirements of Section 16(a) . . . ."), *with Whittaker*, 639 F.3d at 530 ("[W]e hold that an insider's failure to disclose covered transactions in the required § 16(a) reports tolls the two year limitations period for suits under § 16(b) to recover profits connected with such a non-disclosed transaction."). *See also* Peter Romeo & Alan Dye, SECTION 16 § 9.03[3][b] at 872 n.107 (3d ed. 2008) (citing *Litzler*, *Whittaker*, and many other cases for same proposition).

Both courts also apply similar rationales to support their holdings. Both read Sections 16(a) and 16(b) as a whole, and agree that Congress' purpose in enacting Section 16 would be frustrated if targeted insiders could escape Section 16(b) liability by failing to comply with their Section 16(a) reporting obligations. The Second Circuit in *Litzler* reasoned:

- "[T]o allow an offending investor to escape responsibility under Section 16(b) by violating the provisions of Section 16(a) would manifestly frustrate the purpose of Congress." *Litzler*, 362 F.3d at 207 (citation and quotation omitted).

- "Section 16 compels disclosure (through a Form 4 [Section 16(a) report]) that is so clear that an insider's short-swing profits will be discovered without any investigation other than the putting together of two and two." *Litzler*, 362 F.3d at 208.

- "The prophylaxis of Section 16 works by imposing an absolute duty of disclosure upon insiders." *Id.*

- "We hold that the incentives of Section 16 are best served if tolling is triggered by noncompliance with the disclosure requirements of Section 16(a)." *Id.*

The Ninth Circuit in *Whittaker* similarly reasoned:

- A rule allowing insiders to "escape liability by not reporting as required under Section 16(a)" would "thwart[]" Congress' purpose in enacting Section 16 to "curb insider trading." *Id.* at 528.

- The "short [two-year] limitations period [for Section 16(b) claims] is understandable only in the context of the insider's duty to make prompt disclosure" in Section 16(a) reports. *Id.*

- Section 16(a) reports are the "main source of information for the suits Congress has empowered [shareholders] to bring." Insiders could "insulate their transactions . . . by failing to file §16(a) reports and waiting for the two year time limit to pass" thereby "nullif[ying]" "Congress' creation of these shareholder' derivative suits." *Id.*

- Section 16 imposes "absolute accountability within clearly demarcated boundaries," and the "goal of clear boundaries is served by a limitations period which can be mechanically calculated from objective facts." *Id.* at 529.

Petitioners argue that *Litzler* implies that a reasonable failure to file Section 16(a) reports warrants avoiding tolling. Pet. at 16 (citing *Litzler*, 362 F.3d at 208 n.5). This position, however, was not the holding of the Second Circuit. It was not even dictum of the court. It was a side-comment addressing what the "author of th[e] opinion" (Judge Jacobs) "would have preferred to say." *Litzler*, 362 F.3d at 208 n.5. Even then, Judge Jacobs based his passing editorial on concern that "long-settled transactions might hang forever over ***honest*** persons." *Id.* (emphasis added). Petitioners' conduct was anything but "honest." Petitioners engaged in SEC-prohibited, bad-faith kickback schemes that unlawfully concealed their beneficial ownership in issuer securities by conducting short-swing trades through customer accounts.

B. The Failure to Disclose Section 16(a) Information Does Not End Tolling Under Either *Litzler* or *Whittaker*.

The only difference between the Second Circuit opinion in *Litzler* and the Ninth Circuit opinion in *Whittaker* is how tolling ends. That difference, however, is not material to this litigation. In the Ninth Circuit, tolling ends when the insider files a Section 16(a) report. *Whittaker*, 639 F.2d at 530 ("The two-year period for § 16(b) begins to run when the transactions are disclosed in the insider's § 16(a) report."). At that point, a claimant has two years to bring suit even if the insider is alleged to have "falsely reported" or filed an "improper disclosure" under Section 16(a). *Roth v. Reyes*, 567 F.3d 1077, 1081, 1083-84 (9th Cir. 2009).[7]

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[7] For this reason, Petitioners' fear that the Ninth Circuit decision creates a risk of "indefinite" tolling is unfounded. Pet. at 1. All any insider needs to do to stop tolling is comply with the statutory obligation and file a Section 16(a) report. The report can be filed at any time and does not constitute an admission of liability. The report also may be filed, without prejudice, reserving all rights the insiders would claim in this case. For example, filing a Section 16(a) report is not an admission of membership in a Section 13(d) group. Nor does it concede beneficial ownership. *See* 17 C.F.R. § 240.16a-1(a)(4); *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 129 (2d Cir. 2001). As the Ninth Circuit held in *Roth*, even an insider's alleged "false" claim of exemption in a Section 16(a) report does not change the fact that filing the report ends tolling. *Roth*, 567 F.3d at 1081, 1083-84.

In the Second Circuit, tolling ends either when the insider files a Section 16(a) report or when the "claimant or (depending on the circumstances) the company gets ***actual*** notice that a person subject to Section 16(a) ***has realized specific short-swing profits*** that are worth pursuing." *Litzler*, 362 F.3d at 208 (emphasis added). The Second Circuit underscored that "actual notice" in this context means the plaintiff received "notice tantamount to a Form 4 [Section 16(a) report]." *Id.* The *Litzler* court provided three examples that would ***not*** suffice as "tantamount" to a Section 16(a) filing: "mere inquiry notice"; "circumstances in which a person would or should have realized the non-compliance"; and "the ability of a shareholder or company to piece together the substance of a Form 4 [Section 16(a) report] from disparate sources of information." *Id.* The court also summarized two district court cases holding other SEC filings (Forms 144, 10-Q, and 13D) likewise would not provide equivalent Section 16(a) disclosure. *Id.* at 208 n.6. In sum, the Second Circuit decision in *Litzler* holds that the Section 16(b) two-year time period begins to run when the plaintiff gets actual notice of Section 16(a) information, including the "specific short-swing profits" trading details.[8]

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[8] Respondent and leading Section 16 commentators believe the Ninth Circuit *Whittaker* decision provides the better approach as to when tolling ends. Romeo & Dye, *supra*, § 9.03[3][b] at 873. *Whittaker* is more consistent with insiders' obligation to report short-swing trading to the SEC. *Id.* *Whittaker* also provides a clear rule for district courts to carry out before expensive and time-intensive litigation on the merits. The Second Circuit approach could require uncertain, lengthy, and costly fact-intensive pretrial litigation and trials just to resolve a statute of limitations "actual notice" defense.

Underwriters have no evidence that Respondent has (or ever had) actual notice of the Section 16(b) insiders' ***"specific short-swing profits."*** *Litzler*, 362 F.3d at 208 (emphasis added). Petitioners state the *IPO* litigation revealed "the facts underlying the Section 16(b) claims." Pet. at 18.[9] The implication of this argument is that the *IPO* litigation revealed the insiders' "specific short-swing profits" or other Section 16(a) information sufficient to end tolling under *Litzler*. This is not true. Underwriters cite no evidence in the district court or Ninth Circuit record that reveals ***any*** Section 16(a) information, much less "specific short-swing profits" or a notice "tantamount to" a Section 16(a) report. Nor is there any.[10]

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[9] Underwriters repeatedly refer to notice of the "underlying facts." *See, e.g.*, Pet. at 2, 18. Underwriters, however, never describe the "facts" ostensibly revealed or identify the "notice" allegedly containing those "facts." This is not the proper test under *Litzler* in any event, as discussed above. Actual notice, under *Litzler*, refers to actual notice of a Section 16(a) report equivalent, disclosing the specifics of the short-swing trading details. Underwriters and Issuer insiders have never disclosed ***these*** "underlying facts."

[10] Consideration of such evidence would be inappropriate on a Rule 12 motion to dismiss in any event, as the Second Circuit in *Litzler* recognized. The Second Circuit remanded the case for further proceedings, including potentially "trial." *Litzler*, 362 F.3d at 208. The alleged "actual notice" was based on a letter from a shareholder to the corporate board. *Id.* at 205. The parties agreed that whatever notice this letter provided would be imputed to the bankruptcy trustee who had substituted in as the plaintiff. *Id.* at 205-06. The court indicated the district court would have to evaluate any "particulars recited" in the notice and the reliability of the "source" from which it came in order to assess whether the shareholder letter was truly "tantamount to" an insider's Section 16(a) report. *Id.* at 208.

Underwriters also lack evidence that Respondent herself (or her attorneys) received ***any*** notice from the *IPO* litigation. Respondent was not a shareholder when the *IPO* litigation complaints were filed. She was not a member of the proposed class covered by the *IPO* litigation. Petitioners offer nothing even remotely akin to the type of evidence that would constitute actual notice of Section 16(a) information as described in *Litzler*.

In sum, the fundamental holding of both the Second Circuit in *Litzler* and the Ninth Circuit in *Whittaker* is to toll the two-year statute of limitations for Section 16(b) claims when the targeted insiders have failed to comply with their Section 16(a) reporting obligations. These Circuits diverge only on a narrow point—whether tolling ends only when the insider files a Section 16(a) report (*Whittaker*), or whether tolling ends either when the Section 16(a) report is filed or when the plaintiff has otherwise received actual notice of all Section 16(a) information (*Litzler*). It is difficult to envision any case where the difference between these two tests would actually matter. Regardless, the difference has no bearing here. Section 16(a) reports have not been filed, nor has Section 16(a) information been disclosed in any other manner.

II. TOLLING WHEN INSIDERS FAIL TO DISCLOSE THEIR SHORT-SWING TRADING ACTIVITIES DOES NOT CONFLICT WITH THIS COURT'S DECISIONS.

Review of the Ninth Circuit's statute of limitations decision also is not warranted on the ground that the decision conflicts with this Court's opinions in *Lampf,* *Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010). There is no conflict. Neither *Lampf* nor *Merck* is a Section 16 case. Neither case holds that Section 16(b)'s two-year statute of limitations can or should operate as a statute of repose when the targeted insiders, as here, have failed to comply with Section 16(a)'s reporting obligations. *Lampf*'s discussion of Section 16(b) is dictum, limited to a single footnote to explain why Section 16(b) is unique and therefore of no value to the Court's analysis. *Lampf*, 501 U.S. at 360 n.5. *Merck* does not even mention Section 16(b).

In *Lampf*, this Court rejected application of equitable tolling to the time limit for claims arising under Section 10(b) of the Securities Exchange Act of 1934. Section 10(b) did not contain a limitations period, unlike other provisions in the Act. The Court therefore looked to other causes of action in the Act that included some variation of a one-year discovery period coupled with a three-year period of repose. Section 16, as the Court noted, was different. Although the Court called Section 16(b)'s two-year limitations period a "statute of repose,"[11] the Court did "not find § 16(b) to be an appropriate source from which to borrow a limitations period" because Section 16(b) "differs in focus from § 10(b) and from the other express causes of action." *Lampf*, 501 U.S. at 360 n.5.

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[11] This discussion was dictum as noted above. The Court did not analyze whether the "statute of repose" label was proper or, more importantly, whether it was intended to be used in the way Underwriters argue. In one sense, the label fits: once a Section 16(a) report is filed, the two-year period in Section 16(b) serves as an outside limit that cuts off untimely claims—even if the Section 16(a) filing contains false or improper disclosures. *See, e.g.*, *Roth*, 567 F.3d at 1081, 1083-84. As the Ninth Circuit has held, however, this still is consistent with *Whittaker*. *Id.*

Underwriters (and Judge Smith's concurring opinion below) mischaracterize Section 16 as a "companion" provision with similar "relevant language" to the other statutes of limitations in the Act. Pet. 19, 21. This Court correctly viewed Section 16 as unique. The other causes of action in the Act contain limitations language that materially differs from Section 16(b). *See, e.g.*, *Merck*, 130 S. Ct. at 1790 (quoting 28 U.S.C. § 1658(b); *id.* at 1795 (discussing 15 U.S.C. §§ 78i(e), § 77m); *Lampf*, 501 U.S. at 360 (quoting 15 U.S.C. §§ 78i(e), § 78r(c), § 77m). Most significantly, the other limitations provisions include express discovery rules where the focus is on the ***plaintiff*** (whether the plaintiff, or a reasonably diligent plaintiff, discovered certain facts supporting the cause of action). *Id.*; *see also Merck*, 130 S. Ct. at 1793-98 (describing how discovery rule operates); *Lampf*, 501 U.S. at 358-64 (same). Section 16 contains its own, differently worded, two-year time limit, no discovery rule, and, instead, a unique disclosure obligation where the focus is on the ***defendant*** (whether the targeted insider disclosed its short-swing transactions in a required Section 16(a) report).

Lampf held that tolling was "unnecessary" for Section 10(b) claims in light of the discovery rule. *Lampf*, 501 U.S. at 363. Section 16(b) has no similar discovery rule that would render tolling "unnecessary." For this reason, district courts and commentators have concluded that *Lampf* does not prevent tolling of the Section 16(b) statute of limitations when the insider has failed to comply with its Section 16(a) disclosure obligation. *See, e.g., Tristar Corp. v. Freitas*, 867 F. Supp. 149, 154 n.4 (E.D.N.Y. 1994) ("*Lampf* does not preclude the Court from concluding that tolling is still available under section 16(b)."), *rev'd on other grounds*, 84 F.3d 550 (2d Cir. 1996); *Kellett*, No. C01-1528P, slip op. at 9 (further noting that no court has ever read *Lampf* to eliminate Section 16(b) tolling, including cases that adopted *Whittaker* after *Lampf* was decided); Marc I. Steinberg & Daryl L. Landsdale, Jr., *The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934*, 68 NOTRE DAME L. REV. 33, 59-60 (1992).

Underwriters argue Congress could have been more explicit in tying Section 16(b)'s limitations period to the filing of Section 16(a) reports. Pet. at 21. However, the two subsections are part of the same statute, and the statute of limitations in Section 16(b) is grammatically linked to the disclosure obligation in Section 16(a). The limitations provision appears in the second sentence of Section 16(b) and reads: "no such suit shall be brought more than two years after the date ***such*** profit was realized." (Emphasis added). "Such" profit means "any profit realized by" "***such*** beneficial owner, director, or officer" (the first sentence of Section 16(b)), and "such" beneficial owner, director, or officer is defined in Section 16(a)(1) in setting out the scope of the disclosure obligation—i.e., which persons are required to filed Section 16(a) reports. In short, contrary to Underwriters' interpretation, Sections 16(a) and (b) ***must*** be read together. *See also Foremost-McKesson*, 423 U.S. at 234 n.1 (noting Section 16(a) defines the insiders whose trading is regulated by Section 16(b)). Yet Underwriters' interpretation of the Section 16(b) time limit would require the Court to sever Section 16(a)'s disclosure obligation from the statute.

Section 16 must be read as a whole to effectuate its purpose. *Reliance Elec.*, 404 U.S. at 424 (Section 16(b) must be construed in manner "that best serves the congressional purpose of curbing short-swing speculation by corporate insiders"); *see also Whittaker*, 639 F.2d at 528 ("The disclosures and reports of § 16(a) are an integral part of the context of § 16 within which § 16(b) must be read."). The short, two-year limitations period makes sense only in the context of the insider's obligation to make prompt disclosures under Section 16(a). *Whittaker*, 639 F.2d at 528; *see also* Steinberg & Landsdale, *supra*, 68 NOTRE DAME L. REV. at 59 (Section 16(b) "logically affords a remedy that presumes that the subject insider timely filed the reports mandated" by Section 16(a)). The congressional intent, as described by the Court in *Reliance Electric*, "would be thwarted if insiders could escape liability by not reporting" as Section 16(a) requires. *Whittaker*, 639 F.2d at 528. Underwriters' interpretation would provide insiders with a massive financial incentive ***not*** to file Section 16(a) reports:

> "It would be a simple matter for the unscrupulous to avoid the salutary effect of Section 16(b) which provides a remedy for the recovery of short term profits, simply by failing to file [Section 16(a) reports] and thereby concealing from prospective plaintiffs the information they would need to adequately protect their interests. Such a construction

> would reward the violation of the statute and would manifestly frustrate congressional intent."

Id. (quoting *Blau*, 157 F. Supp. at 819) (citing *Grossman*, 72 F. Supp. at 378-79).

> "Only by full compliance with Section 16(a) can the security holders be charged with adequate notice of the transaction." Such shareholders are likely to be outsiders, minority holders. Their main source of information for the suits Congress has empowered them to bring likely will be the required § 16(a) reports. If insiders could insulate their transactions from the scrutiny of outside shareholders by failing to file § 16(a) reports and waiting for the two year time limit to pass, then Congress' creation of these shareholders' derivative suits would be nullified.

Id. (quoting Donald C. Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 385, 414 (1953)) (footnote omitted); *see also Litzler*, 362 F.3d at 207 (same); Steinberg & Landsdale, *supra*, 68 NOTRE DAME L. REV. at 59 (same).

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court deny the Underwriters' petition.

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APPENDIX

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Appendix A: Blank Section 16(a) Report Form (foldout exhibit) 1b

APPENDIX A

Blank Section 16(a) Report Form

[See foldout, next 2 pages]

FORM 4

☐ **Check this box if no longer subject to Section 16. Form 4 or Form 5 obligations may continue. *See* Instruction 1(b).**

(Print or Type Responses)

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

STATEMENT OF CHANGES IN BENEFICIAL OWNERSHIP

Filed pursuant to Section 16(a) of the Securities Exchange Act of 1934, Section 17(a) of the Public Utility Holding Company Act of 1935 or Section 30(h) of the Investment Company Act of 1940

OMB APPROVAL	
OMB Number:	3235-0287
Expires:	November 30, 2011
Estimated average burden hours per response	0.5

1. Name and Address of Reporting Person*	2. Issuer Name and Ticker or Trading Symbol		5. Relationship of Reporting Person(s) to Issuer (Check all applicable) _____ Director _____ 10% Owner _____ Officer (give title below) _____ Other (specify below)
(Last) (First) (Middle)	3. Date of Earliest Transaction Required to be Reported (Month/Day/Year)	4. If Amendment, Date Original Filed(Month/Day/Year)	
(Street)			6. Individual or Joint/Group Filing (Check Applicable Line) __ Form filed by One Reporting Person __ Form filed by More than One Reporting Person
(City) (State) (Zip)			

Table I — Non-Derivative Securities Acquired, Disposed of, or Beneficially Owned

1. Title of Security (Instr. 3)	2. Transaction Date (Month/Day/Year)	2A. Deemed Execution Date, if any (Month/Day/Year)	3. Transaction Code (Instr. 8)		4. Securities Acquired (A) or Disposed of (D) (Instr. 3, 4 and 5)			5. Amount of Securities Beneficially Owned Following Reported Transaction (s) (Instr. 3 and 4)	6. Ownership Form: Direct (D) or Indirect (I) (Instr. 4)	7. Nature of Indirect Beneficial Ownership (Instr. 4)
			Code	V	Amount	(A) or (D)	Price			

Reminder: Report on a separate line for each class of securities beneficially owned directly or indirectly.

* If the form is filed by more than one reporting person, *see* Instruction 4(b)(v).

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(*e.g.*, puts, calls, warrants, options, convertible securities)

1. Title of Derivative Security (Instr. 3)	2. Conversion or Exercise Price of Derivative Security	3. Transaction Date (Month/Day/Year)	3A. Deemed Execution Date, if any (Month/Day/Year)	4. Transaction Code (Instr. 8)		5. Number of Derivative Securities Acquired (A) or Disposed of (D) (Instr. 3, 4, and 5)		6. Date Exercisable and Expiration Date (Month/Day/Year)		7. Title and Amount of Underlying Securities (Instr. 3 and 4)		8. Price of Derivative Security (Instr. 5)	9. Number of derivative Securities Beneficially Owned following Reported Transaction(s)(Instr. 4)	10. Ownership Form of Derivative Security: Direct (D) or Indirect (I) (Instr. 4)	11. Nature of Indirect Beneficial Ownership (Instr. 4)
				Code	V	(A)	(D)	Date Exercisable	Expiration Date	Title	Amount or Number of Shares				

Explanation of Responses:

**Signature of Reporting Person

Date

** Intentional misstatements or omissions of facts constitute Federal Criminal Violations.
See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a).

Note: File three copies of this Form, one of which must be manually signed. If space is insufficient, *see* Instruction 6 for procedure.

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BRIEF

Supreme Court, U.S.
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No. 10-1261

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

VANESSA SIMMONDS,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

REPLY TO BRIEF IN OPPOSITION

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June 6, 2011

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INTRODUCTION

The brief in opposition only confirms that this Court's review is warranted. Respondent does not, and cannot, deny that the Second and Ninth Circuits have adopted "differen[t]" legal rules for determining when tolling ends under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). Opp. 19, 22 (citing *Litzler v. CC Invs. L.D.C.*, 362 F.3d 203 (2d Cir. 2004), and *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981)). Similarly, respondent does not, and cannot, deny that this Court has characterized the two-year time limit for bringing an action under Section 16(b) as a "statute of repose" not subject to tolling at all. Opp. 23 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991)). And respondent does not, and cannot, deny that whether Section 16(b) is subject to tolling at all, and if so, when such tolling ends, are important and recurring issues of federal law. Opp. 14-15 (citing cases). Indeed, the author of the opinion below specially concurred to highlight the need for clarification of these issues. *See* Pet. App. 72-75a (M. Smith, J., specially concurring). While respondent obviously disagrees with petitioners on the merits, that disagreement provides no basis for this Court to deny review.

ARGUMENT

A. The Conflict Among The Circuits

Although it is undisputed that the Second and Ninth Circuits have adopted "differen[t]" Section 16(b) tolling rules, Opp. 19, 22, respondent nonetheless urges this Court to deny review on the ground that the difference is "not material to this litigation," *id.* at 19. According to respondent, the two-year time limit for bringing a Section 16(b) claim would be tolled for her claims even under the Second Circuit's approach. *See id.* at 20-22. In particular, she argues that the Second Circuit's "actual notice" standard can be satisfied only when "*the plaintiff* gets actual notice of Section 16(a) information, including the 'specific short-swing profits' *trading details.*" Opp. 20 (quoting *Litzler*, 362 F.3d at 208) (emphasis added). Respondent is wrong for two reasons.

First, respondent mischaracterizes the Second Circuit's holding in *Litzler*. The court did not hold that Section 16(b) tolling ends only when "the *plaintiff*" has actual notice of a claim. Opp. 20 (emphasis added). To the contrary, the Second Circuit recognized that Section 16(b) tolling also ends when the *issuing corporation* has actual notice of a claim. *See* 362 F.3d at 208. Indeed, the Second Circuit remanded in *Litzler* for the district court to assess the *corporation's* knowledge, not the *plaintiff's* knowledge. *See id.* That approach makes sense: a Section 16(b) shareholder plaintiff, after all, brings a claim on "behalf of the issuer." 15 U.S.C. § 78p(b).

Respondent thus misses the point by arguing that *she personally* did not have actual notice of anything, because her father bought her shares in the respondent issuers shortly before filing this lawsuit. *See* Opp. 22; *see also* Pet. App. 107-08a. As the district court recognized, the "actual notice" standard would be meaningless if a Section 16(b) attorney could avoid a time bar by simply "go[ing] out and find[ing] a plaintiff that was not on notice." Pet. App. 110 n.15. This case proves the point, because (as the cover of the brief in opposition confirms) respondent's attorney is also her father. Nothing in *Litzler* supports this absurd and self-defeating result.

Second, respondent incorrectly claims that *Litzler* holds that Section 16(b) tolling ends only when the issuing corporation has actual notice of the specific "trading details" disclosed in a Form 4 filed under Section 16(a). Opp. 20. To the contrary, *Litzler* holds that notice "tantamount to a Form 4" would suffice, and remanded for a determination of whether a shareholder letter demanding that the corporation bring a Section 16(b) action provided such notice. 362 F.3d at 208. As respondent herself emphasizes, such a determination requires a careful factual inquiry by the district court. *See* Opp. 21 n.10 (citing *Litzler*, 362 F.3d at 208).

Curiously, however, respondent then turns around and argues that petitioners here cannot satisfy the *Litzler* "actual notice" standard *as a matter of law*. *See* Opp. 21 & nn. 9, 10. According to respondent, "actual notice" under *Litzler* means "the specifics of the short-swing trading details," *id.* at 21 n.9, and petitioners "cite no evidence in the district court or Ninth Circuit record" that meets this standard, *id.* at 21.

But *Litzler* does not require knowledge of the "specifics" or "details" of a Form 4, as long as the issuing corporation "had *sufficient notice* (*i.e.*, notice tantamount to a Form 4) that Defendants had realized specific short-swing profits that were worth bothering to recapture" through a Section 16(b) action. 362 F.3d at 208 (emphasis added); *see also id.* ("[T]olling would of course end on the date that [the issuing corporation] received *sufficient notice of a possible claim* under Section 16(b).") (emphasis added). *Litzler* does not purport to enumerate the specific information necessary to provide such notice.

Here, the district court conducted the careful factual inquiry that respondent demands, *see* Opp. 21 n.10, and concluded that "all of the facts" sufficient to bring these Section 16(b) cases were known to the issuing corporations and their shareholders at least five years before respondent filed her complaints, Pet. App. 107a. In particular, the allegations are drawn almost verbatim from the allegations made against petitioners and the issuing corporations in the *IPO* litigation brought in 2001. *See* Pet. App. 83a, *see also* Pet. App. 85a ("[Respondent] filed her complaints for short-swing transactions based on the same set of facts as presented in *In re IPO*, albeit under a new theory of liability and almost six years later.").[1] Respondent identified no new facts, unknown to the issuing corporations, that came to light between the *IPO* litigation and the filing of her complaints. Rather, as the district court noted, "the only significant development ... was [respondent's] acquisition of the shares in these companies." App. 108a.

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[1] The brief in opposition confirms that this litigation is based on the very same alleged "underpricing and laddering schemes," Opp. 9, at issue in the *IPO* litigation. Indeed, in explaining the factual basis for her complaints, respondent block-quotes an SEC complaint against an underwriter that allegedly "wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock." Opp. 8. Respondent tellingly omits the date of that complaint, which was filed in *January 2002*, more than five years before respondent filed her complaints, *see* *http://www.sec.gov/litigation/complaints/ complr17327.htm* (last visited June 6, 2011), and indeed was an exhibit in the *IPO* litigation. That complaint is rife with allegations of "profit-sharing arrangements," in which the underwriter allegedly received a portion of the profits that its customers made on transactions in the issuers' stock, which is precisely what respondent alleges in her complaints yielded "insider" short-swing profits subject to Section 16(b). Opp. 8.

Thus, contrary to respondent's argument, this case provides an ideal vehicle to resolve the conflict between the Second and Ninth Circuits, because the district court here ***has already determined*** that the facts sufficient to bring these Section 16(b) claims were known "over five years before these complaints were filed." Pet. App. 108a. Accordingly, petitioners would prevail under the Second Circuit's *Litzler* standard, *see* Pet. App. 107-08a, whereas the Ninth Circuit rejected their timeliness objection as a matter of law on the untenable ground that tolling continues even "*after* the corporation [is] on notice of the insider's trading," Pet. App. 63a (emphasis added; citing *Whittaker*, 639 F.2d at 530).

B. The Conflict With This Court's Precedent

Although it is undisputed that this Court has characterized the two-year time limit for bringing an action under Section 16(b) as a "statute of repose" not subject to tolling, *see Lampf*, 501 U.S. at 360 n.5; *see also id.* at 375 (Kennedy, J., dissenting), respondent dismisses that characterization as mere "dictum" of "no value to the Court's analysis." Opp. 23 & n.11. Indeed, respondent urges this Court to deny review here precisely because the lower courts have been "substantially uniform" in allowing tolling under Section 16(b) notwithstanding this Court's precedent. Opp. 15.

These arguments highlight the need for this Court's review. Contrary to respondent's assertion, this Court's characterization of the two-year time limit in Section 16(b) as a statute of repose was not careless "dictum," Opp. 23 & n.11, but an integral part of the Court's analysis of how the various time limits in the federal securities laws relate to each other and work together as a coherent whole. In particular, this Court characterized the two-year time limit in Section 16(b) as a statute of repose in the context of holding that the judicially-created cause of action under Section 10(b), 15 U.S.C. § 78j(b), and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5, like other provisions of the federal securities laws, is also subject to a period of repose. *See Lampf*, 501 U.S. at 359-60.

Respondent insists, however, that Section 16(b) is "unique" and contains "language that materially differs" from the language of other provisions of the federal securities laws. Opp. 24. In particular, respondent notes that the provisions addressed by this Court in *Lampf* and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010), have a dual structure, with both a discovery rule and a statute of repose. *See* Opp. 24. According to respondent, the absence of a discovery rule in Section 16(b) warrants ignoring this Court's characterization of that time limit as a statute of repose. *See id.*

Respondent completely misreads *Lampf* and *Merck*. This Court emphasized in *Lampf* that Section 16(b) was "*more* restrictive," not *less* restrictive, than the provisions of the securities laws with a dual structure. 501 U.S. at 360 (emphasis added). The discovery rule in those other provisions does not *extend* the statutory time period for filing a suit, but rather *limits* it: once a plaintiff discovers the facts constituting a violation, she must sue within a specified period of time, even *within* the statutory period of repose. "The discovery provisions [in the federal securities laws], unlike the tolling concept, are not designed to determine when the statute commences to run, but to the contrary resulted from a consensus that one should not have the full statutory period to initiate an action once they have discovered the alleged fraud." Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (Mar. 1985). Because Section 16(b) established a shorter time period for bringing suit than these other provisions, there was no need for a discovery rule in Section 16(b) to shorten that period even further.

Respondent fares no better when she tries to justify Section 16(b) tolling on textual grounds. As respondent notes, that provision states that "no such suit"—*i.e.*, a suit to recover the short-swing profit prohibited by Section 16(b)—"shall be brought more than two years after the date such profit"—*i.e.*, the short-swing profit prohibited by Section 16(b)—"was realized." 15 U.S.C. § 78p(b). But that is exactly petitioners' point: under the statute's plain terms, the two-year period begins to run on "the date such profit was realized," *not* on the date the alleged insider files a Form 4 under Section 16(a), as the Ninth Circuit holds, *see* Pet. App. 61-66a; *Whittaker*, 639 F.2d at 527-30, nor even on the date the issuing corporation receives sufficient notice to bring a Section 16(b) lawsuit, as the Second Circuit holds, *see Litzler*, 362 F.3d at 208. If respondent really wants "a clear rule for district courts to carry out before expensive and time-intensive litigation on the merits," Opp. 20 n.8, this is it: a Section 16(b) claim challenging a short-swing profit is untimely if "brought more than two years after the date such profit was realized," 15 U.S.C. § 78p(b), period.

Respondent tries to avoid that straightforward point by observing that "such profit" in Section 16(b) refers to the profit obtained by "such beneficial owner, director, or officer" as defined by Section 16(a). *See* Opp. 25-26. But that observation proves nothing; it simply leads to the unremarkable conclusion that "Sections 16(a) and (b) must be read together." Opp. 25 (emphasis omitted). In no way does that observation call into question this Court's characterization of the two-year time limit in Section 16(b) as a statute of repose. *See Lampf*, 501 U.S. at 360 n.5.

Respondent's prediction that the absence of tolling under Section 16(b) will undermine the disclosure requirements of Section 16(a) and lead to unchecked short-swing profiteering by insiders, *see* Opp. 26-27, is similarly unfounded. As Judge Smith noted in his special concurrence, "[t]he Exchange Act creates more than adequate enforcement mechanisms for enforcing Section 16(a)'s disclosure requirements." Pet. App. 74a. "If the insiders do not file their reports, they may be held professionally, civilly, or criminally liable." *Id.* "And if the insiders withhold their Section 16(a) reports in order to profit from inside information, they may be subjected to Rule 10b-5 securities fraud actions." *Id.* at 75a. What respondent is really seeking here, as Judge Smith pointed out, is "the creation of never-ending liability for corporate directors, officers, and shareholders." *Id.* at 74a. Nothing in Section 16(b) either compels or tolerates that result.

Finally, respondent argues that this Court's review is unwarranted because "the substantially uniform holdings" of the lower courts allow tolling under Section 16(b), Opp. 14-15, notwithstanding this Court's decisions. Once again, that argument only underscores the need for this Court's review. This Court should not allow the lower courts to ignore its precedents and effectively establish a *de facto* nationwide tolling rule under Section 16(b), much less a *de facto* nationwide tolling rule subject to different legal rules in different circuits.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant review.

June 6, 2011

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JOINT APPENDIX

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IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

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JOINT APPENDIX

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Western District of Washington 45

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General Docket
United States Court of Appeal for the Ninth Circuit

Court of Appeals Docket#: 09-35262
Nature of Suit: 3850 Securities, Commodities, Exchange
Vanessa Simmonds v. Credit Suisse Securities (USA), et al
Appeal From: U.S. District Court for Western Washington, Seattle
Fee Status: Paid

Docketed: 04/03/2009
Termed: 12/02/2010

Case Type Information:
1) civil
2) private
3) null

Originating Court Information:
District: 0981-2 : 2:07-cv-01549-JLR
Court Reporter: Kari McGrath
Trial Judge: James L. Robart, District Judge
Date Filed: 10/02/2007

Date Order/Judgment	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
03/12/2009	03/12/2009	03/31/2009	04/02/2009

Date	No.	PROCEEDINGS
05/22/2009	14	Filed (ECF) Appellant Vanessa Simmonds in 09-35262 Stipulated Motion to consolidate cases. See Appendix A to the Stipulated Motion to Consolidate. Date of service: 05/22/2009. [6930847] [09-35262, 09-35280, 09-35312, 09-35315, 09-35316, 09-35320, 09-35366, 09-35288, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368,

Date	No.	PROCEEDINGS
		09-35313, 09-35370, 09-35314, 09-35371, 09-35318, 09-35393, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363, 09-35335, 09-35377, 09-35317, 09-35365] (MAW)
		* * * *
06/22/2009	17	Filed clerk order (Deputy Clerk: LBS): The parties' joint motion to consolidate 54 appeals and 30 cross-appeals is granted. The following cross-appeal briefing schedule shall govern: Plaintiff's first cross-appeal brief is due August 26, 2009; defendants' second cross-appeal briefs are due October 2, 2009; plaintiff's third cross-appeal brief is due November 2, 2009; and defendants' optional cross-appeal reply briefs are due November

Date	No.	PROCEEDINGS
		17, 2009. SEE ORDER FOR FULL TEXT. [6964080] [09-35262, 09-35280, 09-35312, 09-35315, 09-35316, 09-35320, 09-35366, 09-35288, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35313, 09-35370, 09-35314, 09-35371, 09-35317, 09-35365, 09-35318, 09-35393, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (SC)

* * * *

08/26/2009	22	Filed (ECF) Appellant Vanessa

Date	No.	PROCEEDINGS
		Simmonds in 09-35262 Motion to supplement record on appeal. Date of service: 08/26/2009. [7041935] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (MAW)

Date	No.	PROCEEDINGS
08/26/2009	23	Submitted (ECF) First Brief on Cross-Appeal brief for review. Submitted by Appellant Vanessa Simmonds in 09-35262. Date of service: 08/26/2009. [7041958] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363]

Date	No.	PROCEEDINGS
		(MAW)
		* * * *
08/26/2009	25	Filed Appellant Vanessa Simmonds excerpts of record in 3 volumes. Served on 08/26/2009. [7043646] (WP)
		* * * *
09/11/2009	27	Filed (ECF) Appellees Bank of America Corporation, Credit Suisse Securities (USA) LLC, J.P. Morgan Securities Inc. and Robertson Stephens, Inc. response to motion (Motion (ECF Filing), Motion (ECF Filing) motion to supplement record on appeal). Date of service: 09/11/2009. [7059509]--[COURT UPDATE: Spread filing to consolidated case nos. 09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393,

Date	No.	PROCEEDINGS
		09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363. 09/14/2009 by MA] (CBW)
09/11/2009	28	Filed (ECF) Appellee Onvia Inc response opposing motion (Motion (ECF Filing), Motion (ECF Filing) motion to supplement record on appeal). Date of service: 09/11/2009. [7059575]--[COURT UPDATE: Spread filing to consolidated case nos. 09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-

Date	No.	PROCEEDINGS
		35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363. 09/14/2009 by MA] (JSJ)
		* * * *
09/18/2009	33	Filed (ECF) Appellant Vanessa Simmonds in 09-35262 reply to response (Motion (ECF Filing), Motion (ECF Filing) motion to supplement record on appeal). Date of service: 09/18/2009. [7067625] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293,

Date	No.	PROCEEDINGS
		09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (ISB)
09/22/2009	34	Filed (ECF) Appellant Vanessa Simmonds in 09-35262 Motion for miscellaneous relief [Praecipe to Withdraw Argument]. Date of service: 09/22/2009. [7070297] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292,

Date	No.	PROCEEDINGS
		09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (ISB)
		* * * *
10/02/2009	42	Submitted (ECF) Second Brief on Cross-Appeal for review. Submitted by Appellees Bank of America Corporation, Credit Suisse Securities (USA) LLC, J.P. Morgan Securities Inc. and

Robertson Stephens, Inc. Date of service: 10/02/2009. [7083378]--[COURT UPDATE: Corrected docket text, spread filing to 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363. 10/05/2009 by MA] (CBW)

Date	No.	PROCEEDINGS
10/02/2009	43	Submitted (ECF) Answering brief for review. Submitted by Appellee Onvia Inc. Date of service: 10/02/2009. [7083562]--[COURT UPDATE: Spread filing to 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363.10/05/2009

Date	No.	PROCEEDINGS
		by MA] (JSJ)
10/02/2009	44	Filed Moving Issuers-Appellees' supplemental excerpts of record on appeal in 1 volume. [7083952] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390,

Date	No.	PROCEEDINGS
		09-35363] (LA)
10/05/2009	45	Filed clerk order: Second Brief on Cross-Appeal [42] filed by Underwriter Defendants-Appellees/Cross-Appellants Credit Suisse Securities (USA) LLC, et al. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7084026] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327,

Date	No.	PROCEEDINGS
		09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (LA)
10/05/2009	46	Filed clerk order: Answering Brief [43] filed by Moving Issuers-Appellees Onvia Inc., et al. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a Red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7084137] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368,

Date	No.	PROCEEDINGS
		09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (LA)
		* * * *
10/05/2009	51	Filed Underwriter Defendants-Appellees/Cross-Appellants' supplemental excerpts of record on appeal in 3 volumes. [7085703] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306,

Date	No.	PROCEEDINGS
		09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (LA)

* * * *

Date	No.	PROCEEDINGS
11/02/2009	54	Submitted (ECF) Third Brief on Cross-Appeal brief for review. Submitted by Appellant Vanessa Simmonds in 09-35262, 09-35280, 09-35282, 09-35285, 09-35286, 09-35288, 09-35289, 09-35290, 09-35292, 09-35293, 09-35297, 09-35300, 09-35301, 09-35302, 09-35303, 09-35306, 09-35307, 09-35308, 09-35309, 09-

35310, 09-35313, 09-35314, 09-35315, 09-35316, 09-35317, 09-35318, 09-35320, 09-35321, 09-35322, 09-35323, 09-35324, 09-35325, 09-35326, 09-35328, 09-35327, 09-35331, 09-35333, 09-35334, 09-35335, 09-35337, 09-35339, 09-35344, 09-35345, 09-35346, 09-35347, 09-35348, 09-35349, 09-35350, 09-35351, 09-35352, 09-35355, 09-35357, 09-35358, Appellee Vanessa Simmonds in 09-35363, 09-35364, 09-35365, 09-35366, 09-35367, 09-35368, 09-35369, 09-35370, 09-35371, 09-35373, 09-35374, 09-35375, 09-35377, 09-35380, 09-35381, 09-35382, 09-35383, 09-35384, 09-35387, 09-35390, 09-35391, 09-35393, 09-35394, 09-35395, 09-35397, 09-35398, 09-35399, 09-35400, 09-35404, 09-35405. Date of service: 11/02/2009. [7116042] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310,

Date	No.	PROCEEDINGS
		09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363]--[COURT UPDATE: Replaced document with searchable version. 11/03/2009 by MA] (MAW)
11/02/2009	55	Filed Appellant/Cross-Appellee Vanessa Simmonds' supplemental excerpts of record on appeal in 1 volume. [7117656] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302,

Date	No.	PROCEEDINGS
		09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (LA)
11/03/2009	56	Filed clerk order: third brief on cross-appeal [54] filed by Vanessa Simmonds. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a yellow cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version

Date	No.	PROCEEDINGS
		submitted electronically. [7117916] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (LA)
11/03/2009	57	Filed clerk order (Deputy Clerk: LBS): Plaintiff's opposed motion to supplement the record is

Date No. PROCEEDINGS

denied. See 9th Circuit Rule 10-2 Kirshner v. Uniden Corp., 842 F.2d 1074 (9th Cir. 1988). Plaintiff's praecipe asking the court to withdraw the argument that Underwriters' and Moving Issuers' briefs were untimely is construed as a motion to strike that argument from plaintiff's first cross-appeal brief submitted on August 26, 2009. So construed, the motion, any response thereto, and all future similar filings is referred to the merits panel for resolution. The briefing schedule is unchanged. [7117924] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326,

Date	No.	PROCEEDINGS
		09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (SC)
		* * * *
11/17/2009	60	Submitted (ECF) Cross-Appeal Reply Brief brief for review. Submitted by Appellees Bank of America Corporation, Credit Suisse Securities (USA) LLC, J.P. Morgan Securities Inc. and Robertson Stephens, Inc. Date of service: 11/17/2009. [7133360]--[COURT UPDATE: Spread entry to all consolidated and cross-appeal cases - 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-

Date	No.	PROCEEDINGS
		35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363 - Resent NDA. 11/17/2009 by ASW] (CBW)
11/18/2009	61	Filed clerk order: cross-appeal reply brief [60] filed by Underwriter Defendants-Appellees/Cross-Appellants Credit Suisse Securities (USA) LLC, et al. Within 5 working days of the filing of this order, filer is ordered to file 10 copies of the brief in paper format, with a grey cover, accompanied by certification, attached to the end of each copy of the brief, that the

brief is identical to the version submitted electronically. [7134143] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35328, 09-35327, 09-35382, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (LA)

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Date	No.	PROCEEDINGS
09/28/2010	69	Filed (ECF) Appellee Onvia Inc citation of supplemental authorities. Date of service: 09/28/2010. [7489999]--[COURT UPDATE: Attached searchable version of 28j Letter. Spread docket text to consolidated and cross appeal cases, 09–35262, 09–35280, 09–35282, 09–35375, 09–35285, 09–35286, 09–35367, 09–35288, 09–35289, 09–35290, 09–35381, 09–35292, 09–35364, 09–35293, 09–35297, 09–35373, 09–35300, 09–35301, 09–35374, 09–35302, 09–35303, 09–35391, 09–35306, 09–35307, 09–35308, 09–35309, 09–35369, 09–35310, 09–35368, 09–35312, 09–35313, 09–35370, 09–35314, 09–35371, 09–35315, 09–35316, 09–35317, 09–35365, 09–35318, 09–35393, 09–35320, 09–35366, 09–35321, 09–35397, 09–35322, 09–35323, 09–35404, 09–35324, 09–35325, 09–35326, 09–35405, 09–35327, 09–35382, 09–35328, 09–35331, 09–35333, 09–35380, 09–35334, 09–35383, 09–35335, 09–35377, 09–35337, 09–35339, 09–35395, 09–35344, 09–35345, 09–35399, 09–35346, 09–35398, 09–35347, 09–35394, 09–35348, 09–35387, 09–35349, 09–35350, 09–35400,

Date	No.	PROCEEDINGS
		09–35351, 09–35352, 09–35384, 09–35355, 09–35357, 09–35358, 09–35390, 09–35363. Resent notice. 09/30/2010 by RY] (JSJ)
10/01/2010	70	Filed (ECF) Appellant Vanessa Simmonds in 09-35262 citation of supplemental authorities. Date of service: 10/01/2010. [7493594] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350,

Date	No.	PROCEEDINGS
		09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (JIT)
		* * * *
10/05/2010	72	ARGUED AND SUBMITTED TO SIDNEY R. THOMAS, MILAN D. SMITH, JR. and MICHAEL R. HOGAN. [7497831] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347,

Date	No.	PROCEEDINGS
		09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (KM)
		* * * *
12/02/2010	74	FILED OPINION (SIDNEY R. THOMAS, MILAN D. SMITH, JR. and MICHAEL R. HOGAN) We AFFIRM the district court's conclusion that Simmonds's demand letters to the thirty Moving Issuers were inadequate under Delaware law, REVERSE the district court's conclusion that all of Simmonds's claims are timebarred, and VACATE the district court's dismissal orders as to the thirty Moving Issuers with instructions that the district court dismiss these thirty cases with prejudice on account of Simmonds's failure to satisfy Delaware's demand requirement. We REMAND the remaining twenty-four cases (that is, the cases involving the twenty-four Issuing Companies that did not join the Moving Issuers' Motion to Dismiss) with instructions for the district court to allow the Underwriters and Issuing

Date	No.	PROCEEDINGS
		Companies to file an appropriate motion to challenge the adequacy of Simmonds's demand letters under Delaware, California, Washington, and Bermuda law, unless that law conflicts with Section 16(b). Costs are awarded to the Appellees. Judge: SRT, Judge: MDS Authoring, Judge: MRH, Judge: MDS Concurring. FILED AND ENTERED JUDGMENT. [7564463] [09-35262, 09-35280, 09-35282, 09-35285, 09-35286, 09-35288, 09-35289, 09-35290, 09-35292, 09-35293, 09-35297, 09-35300, 09-35301, 09-35302, 09-35303, 09-35306, 09-35307, 09-35308, 09-35309, 09-35310, 09-35312, 09-35313, 09-35314, 09-35315, 09-35316, 09-35317, 09-35318, 09-35320, 09-35321, 09-35322, 09-35323, 09-35324, 09-35325, 09-35326, 09-35327, 09-35328, 09-35331, 09-35333, 09-35334, 09-35335, 09-35337, 09-35339, 09-35344, 09-35345, 09-35346, 09-35347, 09-35348, 09-35349, 09-35350, 09-35351, 09-35352, 09-35355, 09-35357, 09-35358, 09-35363] (PH)
12/02/2010		Case terminated. See docket entries [80] and [78]. For full

Date	No.	PROCEEDINGS
		disposition opinion, see docket entry [74]. [Affirmed in Part and Reversed/Vacated in Part; Terminated on the merits after oral hearing; Written, reasoned, signed, published;] [7624012] [09-35363, 09-35375, 09-35367, 09-35381, 09-35364, 09-35373, 09-35374, 09-35391, 09-35369, 09-35368, 09-35370, 09-35371, 09-35365, 09-35393, 09-35366, 09-35397, 09-35404, 09-35405, 09-35382, 09-35380, 09-35383, 09-35377, 09-35395, 09-35399, 09-35398, 09-35394, 09-35387, 09-35400, 09-35384, 09-35390] (JI)
12/16/2010	76	Filed (ECF) Appellees Bank of America Corporation, Credit Suisse Securities (USA) LLC, J.P. Morgan Securities Inc. and Robertson Stephens, Inc. petition for panel rehearing and petition for rehearing en banc (from 12/02/2010 opinion). Date of service: 12/16/2010. [7582981]--[COURT UPDATE: Spread entry to cases - 09-35280, 09-35282, 09-35285, 09-35286, 09-35288, 09-35289, 09-35290, 09-35292, 09-35293, 09-35297, 09-35300, 09-35301, 09-35302, 09-35303, 09-35306, 09-35307, 09-

Date	No.	PROCEEDINGS
		35308, 09-35309, 09-35310, 09-35312, 09-35313, 09-35314, 09-35315, 09-35316, 09-35317, 09-35318, 09-35320, 09-35321, 09-35322, 09-35323, 09-35324, 09-35325, 09-35326, 09-35327, 09-35328, 09-35331, 09-35333, 09-35334, 09-35335, 09-35337, 09-35339, 09-35344, 09-35345, 09-35346, 09-35347, 09-35348, 09-35349, 09-35350, 09-35351, 09-35352, 09-35355, 09-35357, 09-35358, 09-35363. Resent NDA. 12/16/2010 by DB] (CBW)
12/16/2010	77	Filed (ECF) Appellant Vanessa Simmonds in 09-35262 petition for rehearing en banc (from 12/02/2010 opinion). Date of service: 12/16/2010. [7583523] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366,

Date	No.	PROCEEDINGS
		09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (MAW)
01/18/2011	78	Filed order and amended opinion (SIDNEY R. THOMAS, MILAN D. SMITH, JR. and MICHAEL R. HOGAN) AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED IN PART. The Opinion filed on December 2, 2010 is amended to appear as set forth below in the Amended Opinion filed concurrently with this Order. (See order for full text.) With this amendment, the panel has unanimously voted to deny Appellees' petition for panel rehearing. Judges Thomas and M. Smith have voted to deny Appellant's petition for rehearing

Date	No.	PROCEEDINGS
		en banc, and Judge Hogan has so recommended. Judge Thomas has voted to deny Appellees' petition for rehearing en banc, and Judge Hogan has so recommended. Judge M. Smith has voted to grant Appellees' petition for rehearing en banc. The full court has been advised of the petitions for rehearing en banc, and no judge of the court has requested a vote on them. Fed. R. App. P. 35. The petition for rehearing and petitions for rehearing en banc are DENIED. No further petitions for rehearing may be filed. [7614842] [09-35262, 09-35280, 09-35282, 09-35285, 09-35286, 09-35288, 09-35289, 09-35290, 09-35292, 09-35293, 09-35297, 09-35300, 09-35301, 09-35302, 09-35303, 09-35306, 09-35307, 09-35308, 09-35309, 09-35310, 09-35312, 09-35313, 09-35314, 09-35315, 09-35316, 09-35317, 09-35318, 09-35320, 09-35321, 09-35322, 09-35323, 09-35324, 09-35325, 09-35326, 09-35327, 09-35328, 09-35331, 09-35333, 09-35334, 09-35335, 09-35337, 09-35339, 09-35344, 09-35345, 09-35346, 09-35347, 09-35348,

Date	No.	PROCEEDINGS
		09-35349, 09-35350, 09-35351, 09-35352, 09-35355, 09-35357, 09-35358, 09-35363] (RP)
01/25/2011	79	Filed order (MILAN D. SMITH, JR.): Appellees' motion for a stay of the issuance of the mandate pending application for a writ of certiorari is GRANTED. Fed. R. App. P. 41(d). The mandate is ordered stayed for ninety days pending the filing of a petition for writ of certiorari in the United States Supreme Court. [7623408] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383,

Date	No.	PROCEEDINGS
		09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (AF)
01/25/2011	80	Filed order FOR PUBLICATION (SIDNEY R. THOMAS, MILAN D. SMITH, JR. and MICHAEL R. HOGAN) The Opinion filed on December 2, 2010 and the Order and Amended Opinion filed on January 18, 2011 are amended to list the case numbers of the cross-appeals, as shown in the captions listed above. [7623920] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366,

Date	No.	PROCEEDINGS
		09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (RP)
01/26/2011	81	Filed (ECF) Appellant Vanessa Simmonds in 09-35262 Motion to stay the mandate and Response joining motion, (motion to stay the mandate). Date of service: 01/26/2011. [7625177] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317,

Date	No.	PROCEEDINGS
		09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (MAW)
01/26/2011	82	Filed order (MILAN D. SMITH, JR.): Appellant's motion for a stay of the issuance of the mandate pending application for a writ of certiorari is GRANTED. Fed. R. App. P. 41(d). The mandate is ordered stayed for ninety days pending Appellant's filing of a petition for writ of certiorari in the United States Supreme Court. [7625754] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-

Date	No.	PROCEEDINGS
		35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (AF)
04/08/2011	83	Received notice from the Supreme Court: petition for certiorari filed on 04/05/2011 and placed on the 04/07/11. Supreme Court Number 10-1218. [7710994] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300,

Date	No.	PROCEEDINGS
		09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (RR)
04/12/2011	84	Received letter dated 04/06/2011 re: ... Appellant has now filed her petition for the writ and therefore, requests that the stay continues until the SC's final disposition. [7714551] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364,

Date	No.	PROCEEDINGS
		09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (GV)
04/20/2011	85	Received notice from the Supreme Court: petition for certiorari filed on 04/15/2011. Supreme Court Number 10-1261. [7724406] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293,

Date	No.	PROCEEDINGS
		09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368, 09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (GV)
06/28/2011	86	Received notice from the Supreme Court. Petition for certiorari GRANTED on 06/27/2011. Supreme Court Number: 10-1261. The petition for writ of certiorari is granted. [7800363] [09-35262, 09-35280, 09-35282, 09-35285, 09-35286, 09-35288, 09-35289, 09-35290,

Date	No.	PROCEEDINGS
		09-35292, 09-35293, 09-35297, 09-35300, 09-35301, 09-35302, 09-35303, 09-35306, 09-35307, 09-35308, 09-35309, 09-35310, 09-35312, 09-35313, 09-35314, 09-35315, 09-35316, 09-35317, 09-35318, 09-35320, 09-35321, 09-35322, 09-35323, 09-35324, 09-35325, 09-35326, 09-35327, 09-35328, 09-35331, 09-35333, 09-35334, 09-35335, 09-35337, 09-35339, 09-35344, 09-35345, 09-35346, 09-35347, 09-35348, 09-35349, 09-35350, 09-35351, 09-35352, 09-35355, 09-35357, 09-35358, 09-35363] (COURT UPDATE: To replace PDF; resent notice--Edited 06/28/2011 by HH) (GV)
06/28/2011	87	The petition for writ of certiorari was denied on 06/27/2011. Supreme Court number 10-1218. (Panel: SRT, MDS and MRH). [7801409] [09-35262, 09-35280, 09-35282, 09-35375, 09-35285, 09-35286, 09-35367, 09-35288, 09-35289, 09-35290, 09-35381, 09-35292, 09-35364, 09-35293, 09-35297, 09-35373, 09-35300, 09-35301, 09-35374, 09-35302, 09-35303, 09-35391, 09-35306, 09-35307, 09-35308, 09-35309, 09-35369, 09-35310, 09-35368,

Date	No.	PROCEEDINGS
		09-35312, 09-35313, 09-35370, 09-35314, 09-35371, 09-35315, 09-35316, 09-35317, 09-35365, 09-35318, 09-35393, 09-35320, 09-35366, 09-35321, 09-35397, 09-35322, 09-35323, 09-35404, 09-35324, 09-35325, 09-35326, 09-35405, 09-35327, 09-35382, 09-35328, 09-35331, 09-35333, 09-35380, 09-35334, 09-35383, 09-35335, 09-35377, 09-35337, 09-35339, 09-35395, 09-35344, 09-35345, 09-35399, 09-35346, 09-35398, 09-35347, 09-35394, 09-35348, 09-35387, 09-35349, 09-35350, 09-35400, 09-35351, 09-35352, 09-35384, 09-35355, 09-35357, 09-35358, 09-35390, 09-35363] (GV)

U.S. District Court
United States District Court for the Western District of Washington (Seattle)
CIVIL DOCKET
FOR CASE #: 2:07-cv-01549-JLR

Simmonds v. Credit Suisse Group et al
Assigned to:
Judge James L. Robart

Date Filed: 10/02/2007
Date Terminated: 03/12/2009
Jury Demand: Plaintiff
Nature of Suit: 850 Securities/Commodities
Jurisdiction: Federal Question

Date	No.	PROCEEDINGS
10/02/2007	1	COMPLAINT FOR RECOVERY OF SHORT-SWING PROFITS UNDER SECTION 16(b) OF THE SECURITIES EXCHANGE ACT OF 1934 -- JURY DEMAND against defendant(s) JPMorgan Chase & Co, Bank of America Corporation, Onvia Inc, Credit Suisse Group (Summons(es) NOT issued) (Receipt #: SEA12444), filed by Vanessa Simmonds. (Attachments: # 1 Civil Cover Sheet) (DJ) (Entered: 10/04/2007)

* * * *

Date	No.	PROCEEDINGS
02/25/2008	11	AMENDED COMPLAINT for Recovery of Short-Swing Profits Under Section 16(b) of the Securities Exchange Act of 1934

Date	No.	PROCEEDINGS
		against defendant(s) Robertson Stephens, Inc., JPMorgan Chase & Co, Bank of America Corporation, Onvia Inc, Credit Suisse Group with JURY DEMAND, filed by Vanessa Simmonds. (Thomas, Jeffrey) (Entered: 02/25/2008)
		* * * *
04/22/2008	36	AMENDED JOINT STATUS REPORT signed by all parties; estimated Trial Days: 20. (Wells, Christopher) Modified on 4/23/2008 (ELS,). (Entered: 04/22/2008)
		* * * *
04/28/2008	39	MINUTE ENTRY *for proceedings held before Judge James L. Robart- Dep Clerk: Casey Condon; Pla Counsel: Jeff Tilden, Jeff Thomas, Will Smart, Ian Birk; Def Counsel: Andrew Clubok, Brant Bishop, Christopher Wells; CR: Susan Zielie*; **STATUS CONFERENCE held April 28, 2008. Underwriter defendants will file one coordinated motion to dismiss and issuer defendants will file one coordinated motion to**

Date	No.	PROCEEDINGS
		dismiss. Opening briefs due July 25, 2008; Responsive briefs due Sept. 8, 2008; and Reply briefs due Oct. 23, 2008, with page limits in compliance with Local Rules. These cases will be coordinated for pretrial purposes using case no. 07-1549 as the master docket. The parties should familiarize themselves with the CM/ECF upgrades. The parties agree to a stay of discovery pending the courts decision on the motion to dismiss. Jeff Thomas shall act as liaison counsel for plaintiff and Christopher Wells, Andrew Clubok and Brant Bishop will act as liaison counsel for Underwriter defendants. Issuer defendants agree to promptly notify the court of their chosen liaison counsel. There shall be no further amendments to the complaints or additional parties added without first seeking leave of court. Liaison counsel for the Underwriter defendants agree to keep the court

Date	No.	PROCEEDINGS
		apprised of the status of the New York "IPO litigation." (CC) (Entered: 04/29/2008)
		* * * *
07/24/2008	50	ORDER RE: LIAISON COUNSEL - The court orders as follows: 1. Liaison counsel is the only counsel authorized to file omnibus motions, pleadings or other matters in these coordinated cases; and 2. Service on liaison counsel shall constitute service on all defendants by Judge James L. Robart. (MD) (Entered: 07/24/2008)
		* * * *
07/25/2008	56	Joint MOTION to Dismiss by Defendant Onvia Inc. Oral Argument Requested. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Proposed Order) Noting Date 10/23/2008 (Jacobsen, Joni) (Entered: 07/25/2008)
07/25/2008	57	MOTION to Dismiss by Defendants Credit Suisse Securities (USA) LLC, Bank of America Corporation, Robertson

Date	No.	PROCEEDINGS
		Stephens, Inc., J.P. Morgan Securities Inc. Oral Argument Requested. (Attachments: # 1 Exhibit A with schedules, # 2 Proposed Order) Noting Date 10/23/2008 (Wells, Christopher) (Entered: 07/25/2008)
09/08/2008	58	RESPONSE, by Plaintiff Vanessa Simmonds, to 57 MOTION to Dismiss. (Attachments: # 1 Proposed Order) (Wilner, Mark) (Entered: 09/08/2008)
09/08/2008	59	RESPONSE, by Plaintiff Vanessa Simmonds, to 56 Joint MOTION to Dismiss. (Attachments: # 1 Proposed Order) (Wilner, Mark) (Entered: 09/08/2008)
09/08/2008	60	DECLARATION of Jeffrey I. Tilden filed by Plaintiff Vanessa Simmonds re 57 MOTION to Dismiss, 56 Joint MOTION to Dismiss (Attachments: # 1 Exhibit A - G, # 2 Exhibit H - R, # 3 Exhibit S - V, # 4 Exhibit W - DD) (Wilner, Mark) (Entered: 09/08/2008)
		* * * *
10/23/2008	66	REPLY, filed by Defendants JPMorgan Chase & Co, Credit Suisse Securities (USA) LLC,

Date	No.	PROCEEDINGS
		Bank of America Corporation, Robertson Stephens, Inc., J.P. Morgan Securities Inc., TO RESPONSE to 57 MOTION to Dismiss (Wells, Christopher) (Entered: 10/23/2008)

* * * *

Date	No.	PROCEEDINGS
03/12/2009	78	ORDER DISMISSING CASES RE:(56) Motion to Dismiss; (57) Motion to Dismiss in case 2:07-cv-01549-JLR; (47) Motion to Dismiss in case 2:07-cv-01572-JLR; (33) Motion to Dismiss in case 2:07-cv-01623-JLR; (39) Motion to Dismiss in case 2:07-cv-01654-JLR by Judge James L. Robart. (MD) (Entered: 03/12/2009)
03/12/2009	79	JUDGMENT BY COURT (MD) (Entered: 03/12/2009)
03/31/2009	80	NOTICE OF APPEAL (09-35262) as to 78 Order on Motion to Dismiss; 79 Judgment by Court by Plaintiff Vanessa Simmonds. Filing Fee $455, Receipt number 0981000000001712256. (Attachments: # 1 Representation Statement, # 2 Civil Appeals Docketing Statement) (Wilner, Mark) Modified on 4/6/2009; added

Date	No.	PROCEEDINGS
		CCA case number (LMK). (Entered: 03/31/2009)
		* * * *
04/10/2009	86	AMENDED Notice of Appeal as to 80 Notice of Appeal, by Plaintiff Vanessa Simmonds. (Attachments: # 1 Amended Representation Statement, # 2 Amended Docketing Statement) (Wilner, Mark) (Entered: 04/10/2009)
		* * * *
04/14/2009	88	NOTICE OF Cross APPEAL by Defendants JPMorgan Chase & Co, Credit Suisse Securities (USA) LLC, Bank of America Corporation, Robertson Stephens, Inc., J.P. Morgan Securities Inc., Credit Suisse Group. (Wells, Christopher) (Entered: 04/14/2009)
04/14/2009	89	Civil Appeals Docketing Statement by Defendants JPMorgan Chase & Co, Credit Suisse Securities (USA) LLC, Bank of America Corporation, Robertson Stephens, Inc., J.P. Morgan Securities Inc., to be transmitted by Clerk to Circuit Court of Appeals. (Attachments: # 1 Exhibit Order and Judgment) (Wells, Christopher)

Date	No.	PROCEEDINGS
		(Entered: 04/14/2009)
		* * * *
04/17/2009	92	ORDER of USCA (09-35262) as to 80 Notice of Appeal, filed by Vanessa Simmonds; (LMK) (Entered: 04/17/2009)
		* * * *
01/25/2011	99	ORDER of USCA (certified copy) as to 88 Notice of Appeal filed by Robertson Stephens, Inc., Bank of America Corporation, Credit Suisse Securities (USA) LLC, Credit Suisse Group, JPMorgan Chase & Co, J.P. Morgan Securities Inc., 80 Notice of Appeal, filed by Vanessa Simmonds. Appellee's motion for stay of the issuance of the mandate pending application for a writ of certiorari is GRANTED. The mandate is ordered STAYED for ninety days pending filing of a petition for writ of certiorari in the United States Supreme Court. (SA) (Entered: 01/27/2011)
01/25/2011	100	ORDER of USCA (09-35262, 09-35363) as to 88 Notice of Appeal filed by Robertson Stephens, Inc., Bank of America Corporation, Credit Suisse Securities (USA) LLC, Credit

Date	No.	PROCEEDINGS
		Suisse Group, JPMorgan Chase & Co, J.P. Morgan Securities Inc., 80 Notice of Appeal, filed by Vanessa Simmonds. The Opinion filed on December 2, 2010 and the Order and Amended Opinion filed on January 18, 2011 are amended to list the case numbers of the cross-appeals, as shown in the captions listed above. (SA) (Entered: 01/27/2011)

Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

VANESSA SIMMONDS,

Plaintiff,

v.

CREDIT SUISSE SECURITIES (USA) LLC, a Delaware limited liability company,

J.P. MORGAN SECURITIES INC., a Delaware corporation,

BANK OF AMERICA CORPORATION, a Delaware corporation,

and

ROBERTSON STEPHENS, INC., a Massachusetts corporation,

Defendants,

and

ONVIA, INC., a Delaware Corporation,

Nominal Defendant.

NO. C07-1549 JLR

FIRST AMENDED COMPLAINT FOR RECOVERY OF SHORT-SWING PROFITS UNDER SECTION 16(b) OF THE SECURITIES EXCHANGE ACT OF 1934

JURY DEMAND

I. IDENTIFICATION OF PARTIES

1. ***Plaintiff Simmonds.*** Plaintiff Vanessa Simmonds is a resident of King County, Washington. She is a shareholder of Onvia, Inc.

2. ***Defendant Credit Suisse.*** Defendant Credit Suisse Securities (USA) LLC ("Credit Suisse") is a Delaware limited liability company headquartered in New York, New York. The conduct of Credit Suisse as alleged herein was performed by Credit Suisse under its former name, Credit Suisse First Boston. Credit Suisse transacts business in the Western District of Washington.

3. ***Defendant J.P. Morgan.*** Defendant J.P. Morgan Securities Inc. ("J.P. Morgan") is a Delaware corporation headquartered in New York, New York. J.P. Morgan is successor-in-interest to Hambrecht & Quist, and was formerly known as Chase Securities, Inc., which used the trade name Chase H&Q (collectively "Chase H&Q"). J.P. Morgan transacts business in the Western District of Washington.

4. ***Defendant Bank of America.*** Bank of America Corporation ("Bank of America") is a Delaware corporation headquartered in Charlotte, North Carolina. At all times relevant hereto, FleetBoston Robertson Stephens Inc. ("FBRS") was a wholly owned and controlled subsidiary of FleetBoston Financial Corporation ("FleetBoston"), a financial holding company. The financial operations of FBRS were, for financial reporting and other purposes, consolidated with the financial operations of FleetBoston and its other subsidiaries. Moreover, FleetBoston had actual authority over, and control of, the financial operations of FBRS and its conduct as alleged herein, and directly and substantially

benefited therefrom. FleetBoston was a "controlling person" under Section 20(a) of the Securities Exchange Act of 1934 (15 U.S.C. § 78t), and was liable for violations of the Securities Exchange Act of 1934 on the part of FBRS. Thereafter, Bank of America became successor-in-interest to FleetBoston. As successor-in-interest to FleetBoston, Bank of America assumed the liabilities of FleetBoston, including liability for the violations by FBRS of Section 16(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78p(b) ("Section 16(b)") as alleged herein. Bank of America transacts business in the Western District of Washington.

5. ***Defendant Robertson Stephens.*** Robertson Stephens, Inc. ("Robertson Stephens") is a Massachusetts corporation, which was formerly known as FBRS. At all times relevant hereto, FBRS was headquartered in San Francisco, California, and transacted business in the Western District of Washington. Roberson Stephens has joint and several liability with Bank of America for the Section 16(b) violations of FBRS as alleged herein.

6. ***Nominal Defendant Onvia.*** Nominal defendant Onvia, Inc, formerly known as Onvia.com, Inc., (collectively "Onvia"), is a Delaware corporation headquartered in Seattle, Washington, and is the issuer in this action brought under Section 16(b).

II. JURISDICTION AND VENUE

7. ***Jurisdiction.*** Jurisdiction in this Court arises under Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa.

8. ***Venue.*** Venue is proper in this Court under Section 27 of the Securities Exchange Act of 1934, 15

U.S.C. § 78aa, because, *inter alia*, defendants Credit Suisse, J.P. Morgan and Bank of America transact business in this district.

III. STATUTORY DEMAND AND VESTING OF SECTION 16(b) CLAIMS

9. ***Statutory Demand.*** By letter dated July 31, 2007, which was faxed and mailed to the Onvia board of directors on that date, Ms. Simmonds, in her capacity as a shareholder of Onvia, made a 60-day demand on Onvia pursuant to Section 16(b).

10. ***Failure to Comply Demand.*** More than 60 days have elapsed, and Onvia has failed to comply with Ms. Simmonds' Section 16(b) demand.

11. ***Vesting of Claims Plaintiff.*** As a result of Onvia's failure to comply with Ms. Simmonds' demand, all rights to maintain this action have vested fully in Ms. Simmonds pursuant to Section 16(b). Onvia is named herein only as a nominal party.

IV. FACTUAL ALLEGATIONS

12. ***Lead Underwriters on Onvia IPO.*** Prior to December 21, 1999, the date on which Onvia filed its initial registration statement/prospectus with the Securities and Exchange Commission ("SEC"), Onvia retained Credit Suisse, Hambrecht & Quist and FBRS to serve as lead underwriters on the Initial Public Offering ("IPO") of Onvia common stock. Onvia filed its final prospectus with the SEC on March 1, 2000, and identified Credit Suisse, Chase H&Q and FBRS as lead underwriters on its IPO.

13. ***Credit Suisse, Chase H&Q and FBRS Create Opportunity to Profit from "Hot" Onvia IPO.*** Based on their assessment of Onvia as a

potentially "hot" IPO, *i.e.*, one in which there likely would be substantial investor demand for shares of Onvia stock in both the IPO allocation and aftermarket, Credit Suisse, Chase H&Q and FBRS created the opportunity for themselves to directly and indirectly profit or share in any profits derived from transactions in Onvia stock.

14. ***Lack of Good Faith in IPO Underwriting Activities.***

(a) ***Scheme to Share in Customer Profits.*** Credit Suisse, H&Q and FBRS, directly and indirectly, through contracts, arrangements, understandings, relationships or otherwise, created the opportunity for themselves to directly and indirectly profit or share in any profits derived from the transactions of their customers in Onvia stock. This conduct violated NASD Conduct Rule 2330(f), which prohibited Credit Suisse, Chase H&Q and FBRS from sharing, directly or indirectly, in the profits or losses of their customers. Based on this violation, Credit Suisse, Chase H&Q and FBRS lacked good faith in connection with their IPO underwriting and distribution activities involving Onvia stock.

(b) ***Laddering Activities***. Credit Suisse, Chase H&Q and FBRS, in conjunction with the other IPO underwriters and with the objective of inflating the aftermarket price of Onvia stock, secretly required customers, in return for allocations of Onvia IPO shares, to purchase additional shares of Onvia stock in the aftermarket at progressively higher prices. This practice is referred to as "laddering," and violates Rule 101 of Regulation M under the Securities Exchange Act of 1934. Based on this violation, Credit Suisse, Chase H&Q, FBRS, and the other IPO underwriters lacked good faith in connection with their IPO underwriting and distribution activities involving Onvia stock.

15. ***Common Objective to Inflate Aftermarket Price of Onvia Stock.*** Credit Suisse, Chase H&Q, FBRS, and Onvia officers, directors and principal shareholders coordinated their efforts towards inflating the aftermarket price of Onvia stock to a level sufficiently above the IPO price to enable them to directly and indirectly reap substantial profits from the sale of Onvia stock. Through their concerted activity, Credit Suisse, Chase H&Q, FBRS, and the Onvia officers, directors and principal shareholders misused, or otherwise took unfair advantage of, the control and influence they had over the internal corporate affairs of Onvia.

16. ***Lock-Up Agreements.*** Onvia's directors and officers, as well as other stock and option holders, as identified in the IPO prospectus, entered into "lock-up agreements" with Credit Suisse and the other IPO underwriters. The lock-up agreements were for the specific purpose of collectively holding—and refraining from selling—shares of Onvia stock, and furthered the overall common objective. These lock-up agreements provided that, subject to limited exceptions, the stockholder could not offer, sell, contract to sell, pledge or otherwise dispose of any Onvia common stock or securities for a period of 180 days after the effective date of the IPO. Credit Suisse, however, had the right, in its sole discretion, at any time without notice, to release all or any portion of the shares subject to lock-up agreements. As a result, Credit Suisse, for itself and as

representative of the other IPO underwriters, directly or indirectly shared control over the disposition of approximately 50 million shares of Onvia common stock at the time of the Onvia IPO.

17. ***Underpricing of IPO***. In furtherance of this common objective, Credit Suisse, Chase H&Q, FBRS, and Onvia officers, directors and principal shareholders agreed to the pricing of Onvia's IPO shares at a small fraction of what they knew to be the likely aftermarket price range of Onvia stock based on clear indications of IPO and aftermarket demand. In doing so, Credit Suisse, Chase H&Q, FBRS, and Onvia officers, directors and principal shareholders coordinated their control and influence over the corporate affairs of Onvia in a manner that was contrary to the interests of Onvia and its other shareholders. The Onvia officers, directors and principal shareholders did so with the expectation of deriving personal financial benefits, after the expiration or earlier release of the lock-up agreements, from their sale of Onvia stock into a market inflated through the activities of Credit Suisse, Chase H&Q, FBRS, and other IPO underwriters. For their part, Credit Suisse, Chase H&Q and FBRS engaged in an IPO allocation scheme involving laddering and improper research-related activities that were designed to inflate the market price of Onvia stock. They did so with the expectation of creating the opportunity to directly and indirectly profit or share in any profits derived from transactions in Onvia stock.

18. ***IPO Shares Priced at $21, Trade in Aftermarket at $65.*** The 9.2 million shares of Onvia stock sold in connection with its IPO raised

$179.7 million for Onvia—less than one—third of what buyers paid for Onvia shares in the immediate aftermarket.

19. ***10% Group Status.*** Credit Suisse, Chase H&Q, FBRS, the other IPO underwriters, and the Onvia officers, directors and principal shareholders beneficially owned Onvia stock, which was registered pursuant to Section 12 of the Securities Exchange Act of 1934, when they engaged in a concerted course of conduct, the purpose of which included: (i) acquiring Onvia stock, including acquiring Onvia stock at progressively higher prices in order to drive up its market price; (ii) holding Onvia stock, including holding Onvia stock pursuant to the lock-up agreements in order to limit the supply of shares available for sale in the market; and (iii) disposing of Onvia stock, including directly or indirectly directing the disposition of Onvia stock so as to share in the profits gained in the aftermarket following the IPO. This concerted activity was designed to further the common objective of creating the opportunity for themselves to profit by selling Onvia stock at the resulting inflated prices. They thereby constituted a group (the "Group") pursuant to Section 13(d) of the Securities Exchange Act of 1934 and Rule 13d-5 promulgated thereunder. Collectively, the Group beneficially owned in excess of 10 percent of Onvia's outstanding common stock from the Group's inception prior to Onvia's IPO on or about March 1, 2000, through at least February 28, 2001 (the "Relevant Period"). As a result, Credit Suisse, Chase H&Q, FBRS, and the other members of the Group were subject to the reporting requirements of Section 16(a) and the short-swing trading prohibition of Section 16(b) throughout the Relevant Period.

20. ***Short-Swing Transactions in Onvia Stock.*** Throughout the Relevant Period and within periods of less than six months, Credit Suisse, Chase H&Q and FBRS profited from purchases and sales, or sales and purchases, of Onvia stock of which they were beneficial owners for purposes of Section 16(b) ("Short-Swing Transactions"). Credit Suisse, Chase H&Q and FBRS directly or indirectly had or shared a direct or indirect pecuniary interest in Onvia stock in various ways, including, but not limited to, the following: (i) by sharing in the profits of customers to whom they made IPO allocations of Onvia stock; (ii) by allocating shares of Onvia stock to executives and other high-level insiders of other companies, both private and public, from which Credit Suisse, Chase H&Q and FBRS expected to receive new or additional investment banking business in return (a practice referred to by the SEC as "spinning"); and (iii) by creating the opportunity for other members of the Group to derive personal financial benefits from the sale of Onvia stock into an inflated market, in an effort by Credit Suisse, Chase H&Q and FBRS to obtain future investment banking business from Onvia.

21. ***Failure to Comply Section 16(a) Reporting Requirements.*** Credit Suisse, Chase H&Q and FBRS failed to report the Short-Swing Transactions as required under of [sic] Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78p(a), thereby tolling the two-year statute of limitations set forth in Section 16(b). Because Credit Suisse, Chase H&Q and FBRS failed to report these Short-Swing Transactions as required by Section 16(a), the precise dates of prohibited Short-Swing Transactions made by them, any member of the

Group, or others, of Onvia stock beneficially owned by Credit Suisse, Chase H&Q and/or FBRS, are unknown to Ms. Simmonds at this time.

V. CAUSE OF ACTION

Short-Swing Profits Generated In Violation of Section 16(b) of the Securities Exchange Act of 1934,15 U.S.C. § 78p(b).

22. ***Incorporation.*** The allegations in the preceding paragraphs are incorporated as if fully set forth herein.

23. ***Profits from Short-Swing Transactions.*** Credit Suisse, Chase H&Q and FBRS profited from Short-Swing Transactions in Onvia stock by engaging in such transactions within periods of less than six month during the Relevant Period. Credit Suisse, Chase H&Q and FBRS thereby violated Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b).

24. ***Remedy.*** Credit Suisse, J.P. Morgan, as successor-in-interest to Chase H&Q, Bank of America, as successor-in-interest to FBRS, and Robertson Stephens must disgorge all profits, with interest, from their respective Short-Swing Transactions in Onvia stock, in amounts to be proven at trial.

VI. REQUESTED RELIEF

Plaintiff respectfully requests the following relief:

(a) Judgment against Credit Suisse, J.P. Morgan, and jointly and severally against Bank of America and Robertson Stephens, for all profits from Short-Swing Transactions prohibited by Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78p(b), in amounts to be proven at trial;

(b) An award of pre-judgment and post-judgment interest on all amounts awarded or restitution or disgorgement ordered;

(c) An award of costs and attorneys' fees against Credit Suisse, J.P. Morgan, and jointly and severally against Bank of America and Robertson Stephens; and

(d) Such other and further relief that this Court deems just and equitable.

DATED this 25th day of February, 2008.

GORDON TILDEN THOMAS
& CORDELL LLP

By ______/s/______________________
Jeffrey I. Tilden WSBA #12219
Jeffrey M. Thomas, WSBA #21175
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Why Has IPO Underpricing Changed Over Time?

Tim Loughran and Jay Ritter*

In the 1980s, the average first-day return on initial public offerings (IPOs) was 7%. The average first-day return doubled to almost 15% during 1990-1998, before jumping to 65% during the internet bubble years of 1999-2000 and then reverting to 12% during 2001-2003. We attribute much of the higher underpricing during the bubble period to a changing issuer objective function. We argue that in the later periods there was less focus

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on maximizing IPO proceeds due to an increased emphasis on research coverage. Furthermore, allocations of hot IPOs to the personal brokerage accounts of issuing firm executives created an incentive to seek rather than avoid underwriters with a reputation for severe underpricing.

What explains the severe underpricing of initial public offerings in 1999-2000, when the average first-day return of 65% exceeded any level previously seen before? In this article, we address this and the related question of why IPO underpricing doubled from 7% during 1980-1989 to almost 15% during 1990-1998 before reverting to 12% during the post-bubble period of 2001-2003. Our goal is to explain low-frequency movements in underpricing (or first-day returns) that occur less often than hot and cold issue markets.

We examine three hypotheses for the change in underpricing: 1) the changing risk composition hypothesis, 2) the realignment of incentives hypothesis, and 3) a new hypothesis, the changing issuer objective function hypothesis. The changing issuer objective function hypothesis has two components, the spinning hypothesis and the analyst lust hypothesis.

The changing risk composition hypothesis, introduced by Ritter (1984), assumes that riskier IPOs will be underpriced by more than less-risky IPOs. This prediction follows from models where underpricing arises as an equilibrium condition to induce investors to participate in the IPO market. If the proportion of IPOs that represent risky stocks increases, there should be greater average underpricing. Risk can reflect either technological or valuation uncertainty. Although there have been some changes in the characteristics of firms going public, these changes are found to be too minor to explain much of the variation in underpricing over time if there is a stationary risk-return relation.

The realignment of incentives and the changing issuer objective function hypotheses both posit changes over time in the willingness of issuing firms to accept underpricing. Both hypotheses assume that underwriters benefit from rent-seeking behavior that occurs when there is excessive underpricing.

The realignment of incentives hypothesis, introduced by Ljungqvist and Wilhelm (2003), argues that the managers of issuing firms acquiesced in leaving money on the table during the 1999-2000 bubble period. (Money on the table is the change between the offer price and the first closing market price, multiplied by the number of shares sold.) The hypothesized reasons for the increased acquiescence are reduced chief executive officer (CEO) ownership, fewer IPOs containing secondary shares, increased ownership fragmentation, and an increased frequency and size of "friends and family" share allocations. These changes made issuing firm decision-makers less motivated to bargain for a higher offer price.

The realignment of incentives hypothesis is similar to the changing risk composition hypothesis in that it is changes in the characteristics of ownership, rather than any nonstationarities in the pricing relations, that are associated with changes in average underpricing. It differs from the changing risk composition hypothesis, however, in that underpricing is not determined solely by the investor demand side of the market.

In our empirical work, we find little support for the realignment of incentives hypothesis as an explanation for substantial changes in underpricing. We find no relation between the inclusion of secondary shares in an IPO and underpricing. And although CEO fractional ownership was lower during the internet bubble period, the CEO dollar ownership (the market value of the CEO's holdings) was substantially higher, resulting in *increased* incentives to avoid underpricing. Furthermore, it is possible that changes in the characteristics of ownership may be partly a *response* to higher underpricing as well as a *cause*. Ljungqvist and Wilhelm (2003) do not provide an explanation for why these changes occurred.

The changing issuer objective function hypothesis argues that, holding constant the level of managerial ownership and other characteristics, issuing firms became more willing to accept underpricing. We hypothesize that, during our sample period, there are two reasons for why issuers became more willing to leave money on the table. The first reason is an increased emphasis on analyst coverage. As issuers placed more importance on hiring a lead underwriter with a highly ranked analyst to cover the firm, they became less concerned about avoiding underwriters with a reputation for excessive underpricing. We call this desire to hire an underwriter with an influential but bullish analyst the analyst lust hypothesis. This results in each issuer facing a local oligopoly of underwriters, no matter how many competing underwriters there are in total, because there are typically only five *Institutional Investor* all-star analysts covering any industry. As Hoberg (2003) shows, the more market power that underwriters have, the more underpricing there will be in equilibrium.

The second reason for a greater willingness to leave money on the table by issuers is the co-opting of decision-makers through side payments. Beginning in the 1990s, underwriters set up personal brokerage accounts for venture capitalists and the executives of issuing firms in order to allocate hot IPOs to them. By the end of the decade, this practice, known as spinning, had become commonplace. The purpose of these side payments is to influence the issuer's choice of lead underwriter. These payments create an incentive to seek, rather than avoid, underwriters with a reputation for severe underpricing. We call this the spinning hypothesis. In the post-bubble period, increased regulatory scrutiny reduced spinning dramatically. This is one of several explanations why underpricing dropped back to an average of 12%. The reduction in spinning removed the incentive for issuers to choose investment bankers who underprice. Investment bankers responded by underpricing less in the post-bubble period.

The contributions of our research are three-fold. First, we develop the changing issuer objective function hypothesis for the increased underpricing of IPOs during the 1990s and the bubble periods. Second, we document many patterns regarding the evolution of the US IPO market during the last two decades. Much of the data has been or will be posted on a website for other researchers to use. Many, although not all, of these patterns have been previously documented, especially for the first two subperiods. Third, we formally test the ability of the changing risk composition, realignment of incentives, and changing issuer objective function hypotheses to explain the changes in underpricing from 1980-1989 ("the 1980s") to 1990-1998 ("the 1990s"), 1999-2000 ("the internet bubble"), and 2001-2003 ("the post-bubble period").

Much of the increased underpricing in the bubble period is consistent with the predictions of the changing issuer objective function hypothesis. In multiple regression tests, the changing risk composition and the realignment of incentives hypotheses have little success at explaining the increase in first-day returns from the 1980s to the 1990s, to the bubble period, or to the post-bubble period. The regression results show that only part of the increase in the bubble period is attributable to the increased fraction of tech and internet stocks going public. Consistent with the changing issuer objective function hypothesis, underpricing became much more severe when there was a top-tier lead underwriter in the latter time periods. These conclusions are not substantially altered after controlling for the endogeneity of underwriter choice.

The rest of this article is as follows. In Section I, we present our changing issuer objective function hypothesis. In Section II, we describe our data. In Section III, we report year-by-year mean and median first-day returns and valuations. In Section IV, we report average first- day returns for various univariate sorts. In Section V, we report multiple regression results with first-day returns as the dependent variable. Section VI discusses alternative explanations for the high underpricing of IPOs during the internet bubble period. Section VII presents our conclusions. Four appendices provide detailed descriptions of our data on founding dates, post-issue shares outstanding, underwriter rankings, and internet IPO identification.

I. Causes of a Changing Issuer Objective Function

Most models of IPO underpricing are based on asymmetric information. There are two agency explanations of underpricing in the IPO literature. Baron (1982) presents a model of underpricing where issuers delegate the pricing decision to underwriters. Investment bankers find it less costly to market an IPO that is underpriced. Loughran and Ritter (2002) instead emphasize the *quid pro quos* that underwriters receive from buy-side clients in return for allocating underpriced IPOs to them. The managers of issuing firms care less about underpricing if they are simultaneously receiving good news about their personal wealth increasing. This argument, however, does not explain why issuers hire underwriters who will *ex post* exploit issuers' psychology. Neither does the realignment of incentives hypothesis.

One can view issuers as seeking to maximize a weighted average of IPO proceeds, the proceeds from future sales (both insider sales and follow-on offerings), and side payments from underwriters to the people who will choose the lead underwriter:

$$\alpha_1 \text{IPO Proceeds} + \alpha_2 \text{Proceeds from Future Sales} + (1 - \alpha_1 - \alpha_2) \text{ Side Payments} \tag{1}$$

The changing issuer objective function hypothesis states that issuers choosing an underwriter in some periods put less weight on IPO proceeds and more weight on the proceeds from future sales and side payments.

In Equation (1), IPO proceeds are a function of the choice of underwriter and underwriting contract (auction or bookbuilding) at the start of the process and, several months later, the bargaining at the pricing meeting for IPOs when bookbuilding is used. Loughran and Ritter (2002) provide a prospect theory analysis of the bargaining at the pricing meeting. The Ljungqvist and Wilhelm (2003) realignment of incentives hypothesis can also be viewed as a theory of the bargaining at the pricing meeting. Neither of these theories, though, explains why an issuing firm would choose an underwriter that would, at the pricing meeting, propose an offer price that leaves more money on the table than necessary. In contrast, the changing issuer objective function hypothesis does provide a theory for the choice of underwriter at the start of the process. Before discussing the analyst lust and spinning hypotheses in more detail, we explain why underwriters want to underprice.

A. Why Underwriters Want to Underprice IPOs

Underwriters, as intermediaries, advise the issuer on pricing the issue, both at the time of issuing a preliminary prospectus that includes a file price range, and at the pricing meeting when the final offer price is set. If underwriters receive compensation from both the issuer (the gross spread) and investors, they have an incentive to recommend a lower offer price than if the compensation was merely the gross spread.

Bookbuilding is the mechanism used to price and allocate IPOs for 99.9% of our sample, with auctions used for the other 0.1%. In the case of bookbuilding, underwriters can decide to whom to allocate shares if there is excess demand. Benveniste and Wilhelm (1997) and Sherman and Titman (2002) emphasize that underwriter discretion can be used to the benefit of issuing firms. Underwriters can reduce the average amount of underpricing, thereby increasing the expected proceeds to issuers, by favoring regular investors who provide information about their demand that is useful in pricing an IPO. Shares can be allocated to those who are likely to be buy-and-hold investors, minimizing any costs associated with price support.

Underwriter discretion can completely eliminate the winner's curse problem if underwriters allocate shares in hot issues only to those investors who are willing to buy other IPOs. As Ritter and Welch (2002) note, if underwriters used their discretion to bundle IPOs, problems caused by asymmetric information could be nearly eliminated. The resulting average level of underpricing should then be no more than several percent. Thus, given the use of bookbuilding, the joint hypothesis that issuers desire to maximize their proceeds and that underwriters act in the best interests of issuers can be rejected whenever average underpricing exceeds several percent.

Although underwriter discretion in allocating IPOs can be desirable for issuing firms, it can also be disadvantageous if conflict of interest problems are not controlled. Underwriters acknowledge that in the late 1990s IPOs were allocated to investors largely on the basis of past and future commission business on other trades. In 1998-2000, for example, Robertson Stephens allocated IPOs to institutional clients almost exclusively on the basis of the amount of commission business generated during the prior 18 months, according to its January 9, 2003 settlement with the NASD and SEC. Credit Suisse First Boston (CSFB) received commission business equal to as much as 65% of the profits that some investors received from certain hot IPOs, such as the December 1999 IPO of VA Linux.[1] The VA Linux

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[1] See the January 22, 2002 SEC litigation release 17327 and news release (available on the SEC website at http://www.sec.gov), and the NASD Regulation news release (available at http://www.nasdr.com). The NASD Regulation news release states that "For example, after a CSFB customer obtained an allocation of 13,500 shares in the VA Linux IPO, the customer sold two million shares of Compaq and paid CSFB $.50 a share—or $1 million—as a purported brokerage commission. The customer immediately repurchased the shares through other firms at normal commission rates of $.06 per share at a loss of $1.2 million on the Compaq sale and repurchase because of the $1 million paid to CSFB. On that same day, however, the customer sold the VA Linux IPO shares, making a one-day profit of $3.3 million."

According to paragraphs 48 and 49 of the SEC complaint, for the July 20, 1999 IPO of Gadzoox, which CSFB lead managed, "at least 261,025 shares were allocated to customers that were willing to funnel a portion of their IPO profits to CSFB." CSFB distributed approximately 3.4 million of the 4.025 million offer, which went from an offer price of $21 to a

(cont'd ...)

IPO was priced at $30 per share, with a 7% gross spread equal to $2.10 per share. For an investor who was allocated shares at $30, and who then sold at the closing market price of $239.25, the capital gains would have amounted to $209.25 per share. If the investor then traded shares to generate commissions of one-half of this profit, the total underwriter compensation per share was $2.10 plus $104.625, or $106.725.

The receipt of commissions by underwriting firms in return for hot IPO allocations violates NASD Rule 2110 on "Free Riding and Withholding." Because the underwriter has an economic interest (a share of the profits) in the IPO after it has been allocated, there is not a "full distribution" of the security. This is economically equivalent to withholding shares and selling them at a price higher than the offer price, in violation of Rule 2110. But if the NASD (a self-regulatory organization) did not enforce its rules, underwriters might find it optimal to violate the rules. Evidence consistent with commission business affecting IPO allocations is contained in Reuter (2004).

The willingness of buy-side clients to generate commissions by sending trades to integrated securities firms depends on the amount of money left

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closing price of $74.8125, up 256%. The following day, July 21, 1999, CSFB was the lead manager on MP3, which was priced at $28 and closed at $63.3125, up 126%. "CSFB distributed 7.2 million of the 10.35 million MP3 shares offered through underwriters. Of the 7.2 million MP3 shares distributed by CSFB, at least 520,170 shares were allocated to customers that were willing to funnel a portion of their trading profits to CSFB."

on the table in IPOs. Underwriters have an incentive to underprice IPOs if they receive commission business in return for leaving money on the table. But the incentive to underprice presumably would have been as great in the 1980s as during the internet bubble period, unless there was a "supply" shift in the willingness of firms to hire underwriters with a history of underpricing. We argue that such a shift did indeed occur, resulting in increased underpricing.

B. The Analyst Lust Explanation of Underpricing

We hypothesize that issuing firms have increasingly chosen their lead underwriter largely on the basis of expected analyst coverage. Providing research coverage is expensive for investment bankers; the largest brokerage firms each spent close to $1 billion per year on equity research during the bubble (Rynecki, 2002). These costs are covered partly by charging issuers of securities explicit (gross spread) and implicit (underpricing) fees. The more that issuing firms see analyst coverage as important, the more they are willing to pay these costs.

There are several reasons for our opinion that analyst lust was more important during the 1990s and bubble period than in the 1980s. First, the investment bankers and venture capitalists we have talked to are unanimous in their agreement. Supporting this, in the early 1970s Morgan Stanley had "no research business to speak of," even though it was a major IPO underwriter (Schack, 2002). As we will show, the number of managing underwriters in IPO syndicates has increased over time. Investment bankers note that co-managers are included in a syndicate almost exclusively to provide research coverage. Indeed, by 2000 co-managers were generally not even invited to participate in road shows and the pricing meeting at which the final offer price is determined.

Second, as valuations have increased, changes in growth rates perceived in the financial markets represent more dollars. Firm value can be decomposed into the value of existing assets in place plus the net present value of growth opportunities. As the value of growth opportunities increases relative to the value of assets in place, issuing firms come to place more importance on analyst coverage. In 1982, for example, when the market price-earnings (PE) ratio was about 8, the difference in valuation for a firm with forecasted growth of 10% versus 15% might translate into a difference in PEs of 8 versus 12. In 1999, when the market PE was about 25, the difference in valuation for forecasted growth of 10% versus 15% might translate into a difference in PEs of 25 versus 40. For a firm with $1.00 in earnings per share, in 1982 the difference in values would have been $4 per share, but in 1999 it would be $15.

A final reason for the increased importance of analyst coverage in the bubble period is the greater visibility of analyst recommendations because of the internet and cable television stations such as CNBC. Consistent with this statement, Busse and Green (2002, Table 5) report that trading volume for Nasdaq stocks during June through October 2000 increased by an average of 300,000 shares in the four minutes after an analyst mentioned a stock favorably on CNBC's Midday Call segment.

The analyst lust hypothesis does not necessarily assume any conflict of interest between managers and other pre-issue shareholders. If favorable analyst coverage results in a higher market price, all pre-issue shareholders benefit.

There is ample supporting evidence for this analyst lust hypothesis. Dunbar (2000) presents evidence that underwriters in 1984-1994 subsequently increased their IPO market share if they had an analyst who was highly ranked in the *Institutional Investor* (*II*) annual survey. Clarke, Dunbar, and Kahle (2003, Table 2) report that investment banks gaining an *II* all-star analyst subsequently boosted their market share of IPOs in the analyst's industry; the changes were greater in 1995-1999 than in 1988-1994. The Krigman, Shaw, and Womack (2001) survey of issuing firms finds that one of the most important reasons to switch underwriters in a seasoned offering is to seek additional and influential analyst coverage from the new banker. Ljungqvist, Marston, and Wilhelm (2003) analyze the determinants of lead underwriter choice for debt and follow-on equity offerings conducted during December 1993 through June 2002. They report that the presence of an *II* all-star analyst in the issuing firm's industry increases the probability of that underwriter being chosen as the lead, holding constant that bank's fraction of the issuer's equity deals during the prior five years.

Hong and Kubik (2003) report that analysts making optimistic forecasts are more likely to move to a higher-status brokerage firm if they change jobs. Furthermore, analysts whose employer underwrites stocks that they cover are more likely to be forced out, the less optimistic their forecasts are. Hong and Kubik report that these biases became even stronger in the 1999-2000 period. Discussions with executives of firms going public in 2001-2003 suggest that analyst coverage is still an important determinant of underwriter choice, in spite of the Global Settlement restrictions on analyst participation in IPOs.

Cliff and Denis (2004) test the analyst lust hypothesis using a sample of 1,050 US firms conducting IPOs during 1993-2000 that subsequently conducted at least one follow-on equity offering during 1993-2001. They find that issuers are less likely to switch underwriters for their first SEO if there had been *greater* underpricing, and if the IPO underwriter's analyst covered the stock one year after the IPO. In their Table 6 regression with an analyst coverage instrument, they report that having an all-star analyst in the industry of the issuing firm at the time of the IPO is associated with first-day returns that are 16.3% higher. Furthermore, their subperiod results show higher incremental underpricing associated with hiring an underwriter with an *II* all-star covering the firm in the bubble period than earlier.

The evidence in all these studies is consistent with the analyst lust hypothesis, and those that report subperiod results find that the effects were stronger in the late 1990s when valuations were highest, just as we predict.

C. The Spinning Explanation of Underpricing

In 1999-2000, the average amount of money left on the table of $85 million per IPO adds up to $68 billion (in dollars of 2003 purchasing power), which seems way too high to be justified as equilibrium compensation for purchasing analyst coverage. This raises two questions. First, if issuing firms wanted to purchase analyst coverage, why did they pay for it by leaving money on the table, rather than paying a higher gross spread? Second, why did they leave so much money on the table?

Our answers are as follows. First, money on the table is state-contingent compensation; the deals leaving a lot of money on the table were the deals where the managers of issuing firms found themselves facing a substantial increase in their personal wealth (Loughran and Ritter, 2002). Second, with bookbuilding, underwriters have discretion over the allocation of hot IPOs. Some shares went to "friends and family" of the issuing firm, as Ljungqvist and Wilhelm (2003) show. But some shares also went to the executives of issuing firms and their venture capitalists through personal brokerage accounts (Siconolfi, 1997).

In this article, we introduce a new agency explanation for IPO underpricing, the spinning hypothesis, which is based on a conflict of interest between decision-makers and other pre-IPO shareholders. It posits that decision-makers are willing to hire underwriters with a history of underpricing because the decision-makers receive side payments.[2] The decision-makers are the

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[2] On April 28, 2003, the "global settlement" between ten top investment banking firms and the NASD, NYSE, SEC, and the states, coordinated by New York Attorney General Eliot Spitzer, imposed a "no spinning" rule that prohibits officers and directors who are in a position to "greatly influence" investment

(cont'd ...)

individuals who choose the managing underwriters, especially the lead underwriter, for an IPO. These decision-makers are the general partners of the lead venture capital firm (if a firm is financed with venture capital money) and the top managers of the issuing firm. The other pre-issue shareholders are the limited partners of venture capital firms and other minority shareholders. Elkind and Gimein (2001) describe the "Friend of Frank" brokerage accounts set up for decision- makers by CSFB, where Frank Quattrone, head of technology investment banking, worked:

> [I]n the 1990s firms also began offering shares to potential clients ... by setting up brokerage accounts specifically for hot IPOs. Under these arrangements, VCs and entrepreneurs made a moderate deposit (perhaps $250,000) and signed over discretionary authority to the brokers whose firms were seeking their favor. Typically, IPO shares would be flipped for a quick—and riskless—windfall. "The stock would go into the hands of venture capitalists and the managements of companies that were going to go public next," notes a Silicon Valley fund manager. "This was the closest thing to free money that there was. It may not be all that much different from a briefcase filled with unmarked tens and 20s." ... Indeed, two Silicon Valley CEOs, who asked that their

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banking decisions from receiving IPO allocations. Proposed NASD Rule 2712 addresses spinning and both clarifies and strengthens NASD Rule 2710.

> names not be used, said that because several competing investment banks were offering them cheap IPO shares, they could not have been influenced when choosing between them.

The March 7, 2003 *San Jose Mercury News* lists, by name and company affiliation, 63 Silicon Valley executives who had "Friends of Frank" accounts at CSFB. The median executive received first-day capital gains of $538,000 from IPO allocations.[3]

Payments like this to individuals motivate the managers of an issuing firm to choose an underwriter with a reputation for leaving money on the table. This spinning theory of IPO underpricing explains why underwriters and issuing firm managers prefer to forego net proceeds by leaving money on the table, rather than pay a higher gross spread. Money on the table is the currency by which underwriters can influence other venture capitalists and issuing firm executives; gross spread revenue cannot be redistributed except in a more transparent manner.

If spinning is an important reason for underpricing in the bubble period, why wasn't it important a decade earlier? In the 1980s, relatively little money was left on the table in IPOs because valuations were low and analyst coverage was not perceived to be as important as it became in the 1990s. As IPO underpricing increased over time, we hypothesize that the use of hot IPOs to reward decision-makers created an incentive for decision-makers to seek out underwriters known to leave money on the table, rather than to avoid such underwriters. Allocating these hot IPOs to the decision-makers of issuing companies and their friends (through friends and family accounts) allowed underwriters to underprice even more. In other words, underpricing fed on itself. In this regard, both our changing issuer objective function and Ljungqvist and Wilhelm's (2003) realignment of incentives hypotheses are similar: Underpricing creates incentives for even more underpricing. What constrains underpricing from increasing without limit is that raising money is still a goal for an issuer.

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[3] Descriptions and evidence regarding spinning are presented in a number of additional sources. Smith (2002) describes the allocation of IPOs to top executives by Goldman Sachs. Smith, Grimes, Zuckerman, and Scannell (2002) describe the allocations to venture capitalists, and Sherburne (2002) lists the allocations to WorldCom officers and directors and to other telecom executives by Citigroup's Salomon Smith Barney unit.

II. Data

Our primary data source for IPOs over 1980-2003 is the Thomson Financial Securities Data (also known as Securities Data Co.) new issues database. We have made hundreds of corrections to this database, and we have collected missing information for thousands of observations from a number of sources, including prospectuses; Howard and Co.'s *Going Public: The IPO Reporter* for IPOs over 1980-1985; Dealogic for IPOs after 1990; and the SEC's Electronic Data Gathering and Retrieval (EDGAR) system for IPOs after 1996 (final prospectuses are identified on EDGAR as document 424B at http://www.sec.gov).[4]

In all of our analysis, we exclude best efforts offers (typically very small offerings, these are not covered by Thomson Financial Securities Data); ADRs (American Depository Receipts, issued by foreign firms that list in at least one other market outside the US); closed-end funds; REITs (real estate investment trusts); banks and savings and loans (S&Ls); partnerships; and firms not covered by CRSP within six months of the offering. We also exclude IPOs with an offer price below $5.00 per share. What remains are almost all IPOs of domestic operating companies that are large enough to be of interest to institutional investors. The sample size is 6,391 firms, although in some of the tables we are missing up to 6% of the sample because of incomplete information.

The main source of information on *venture capital* backing is Thomson Financial. Supplemental data on venture capital backing has been provided by Chris Barry, Paul Gompers, and Josh Lerner.

Information on the *founding date* of companies comes from a variety of sources, discussed in more detail in Appendix A. Laura Field, Alexander Ljungqvist, and Li-Anne Woo provided many of the founding dates. We are missing a reliable founding date for 120 firms.

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[4] While Thomson Financial's database is missing some assets and sales data, and many founding dates, we find no evidence of any backfilling bias. That is, there is no evidence that subsequent "winners" are more comprehensively or accurately covered than other IPOs, so researchers using this database should not worry about introducing a survivorship bias.

The original *file price range* for IPOs over 1980-1982 is transcribed from Howard and Co.'s *Going Public: The IPO Reporter*. The file price range for IPOs from 1983 and later comes from Thomson Financial. We are missing the file price range for 11 firms in the early 1980s.

To calculate the market value of an IPO, we use the offer price multiplied by the post-issue number of shares outstanding. For firms with a single class of shares outstanding, the primary source of data on the *post-issue number of shares* is CRSP. For firms with more than one class of shares outstanding (dual-class firms), we use data from a variety of sources, as described in Appendix B.

Information on *assets, sales,* and *earnings per share (EPS)* in the year prior to going public comes mainly from Thomson Financial. When figures are available, we use sales and earnings per share for the most recent 12 months prior to going public. Otherwise, we use the most recent fiscal year numbers. Additional sources of information include Dealogic for post-1990 IPOs, Howard and Co.'s *Going Public: The IPO Reporter* for 1980-1985 IPOs, and EDGAR. If a firm has zero trailing sales, we assign a sales value of $0.01 million, since in our empirical work we use logarithms, and the logarithm of zero is undefined. If we are unsure whether sales are zero or are missing, we treat the value as missing. We are missing sales numbers for 85 firms and assets numbers for 223 firms.

We use Thomson Financial Securities Data as our source for information on lead underwriters and the number of managing underwriters for each IPO. For *underwriter prestige rankings*, we start with the Carter and Manaster (1990) and Carter, Dark, and Singh (1998) rankings, and then create rankings for 1992-2003 in the spirit of their methodology. Appendix C provides a detailed description of the procedures. The underwriter prestige rankings are on a 0 to 9 scale, and are based on the pecking order seen in "tombstone" advertisements. In our empirical work, if there is more than one lead underwriter, we use the rank of the bookrunner or the highest-ranking joint bookrunner.

Appendix D describes how we identify *internet* IPOs and lists the SIC codes that we use to categorize IPOs as a technology (*tech*) firm or not.

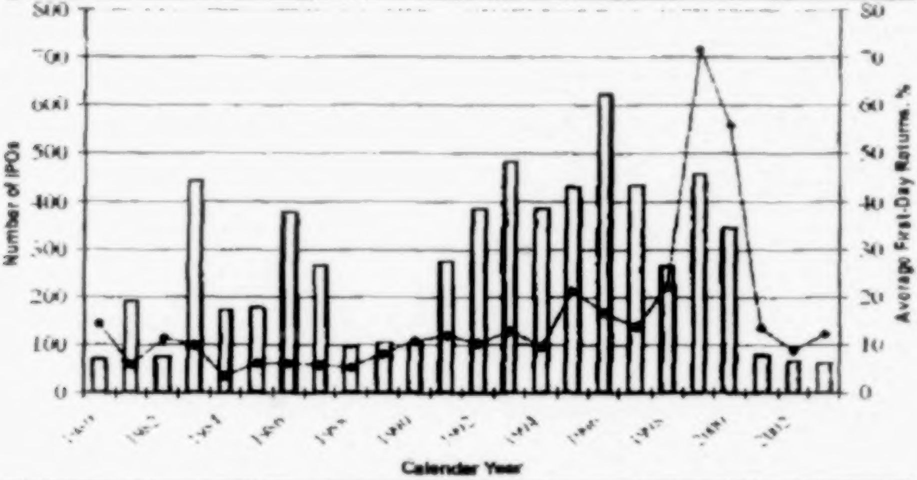
III. Time-Series of First-Day Returns and Valuations

Figure 1 plots the annual volume and average first-day return on IPOs over 1980-2003. Table I reports the means (Panel A) and medians (Panel B) of the first-day returns by year of issue and by subperiod. In all of our analysis, we split the sample into four subperiods: January 1980-December 1989 ("the 1980s"), January 1990-December 1998 ("the 1990s"), January 1999-December 2000 ("the internet bubble"), and January 2001-December 2003 ("the post-bubble period").

In the 1980s, the average first-day return was slightly over 7%. The average first-day return increased to almost 15% in the 1990s, and then jumped to 65% during the internet bubble.

Figure 1. Number of IPOs (Bars) and Average First-Day Returns (Diamonds) by Cohort Year

IPOs with an offer price below $5.00 per share, unit offers, REITs, closed-end funds, banks and S&Ls, ADRs, partnerships, and IPOs not listed on CRSP within six months of the offer date are excluded. Data are from Thomson Financial Securities Data and other sources, with corrections by authors. The first-day return is defined as the percentage change from the offer price to the closing price. The data plotted are reported in Panel A of Table I.



In the post-bubble period, annual IPO volume dropped to 80 issues or fewer with a mean first-day return of approximately 12%.

Table I shows that from 1980 through 1994 the underpricing of IPOs was typically quite modest, as was the amount of money left on the table. In every year from 1995 through 2000, the average first-day return was higher than in any year between 1981 and 1994. Underpricing took a big jump in the bubble period, as did the amount of money left on the table. The number of managing underwriters increased steadily until 2003, with a rapid acceleration in the late 1990s. The conventional wisdom is that the growth in the number of managing underwriters is associated with greater emphasis on analyst coverage.

For IPOs in the 1980s, Panel B reports that the median valuation of $72 million using the offer price was less than twice the annual sales of $38 million. In the 1990s, the market-to- sales ratio increased to 2.7 (median valuation of $122 million relative to median sales of $46 million). During the internet bubble period, the median valuation using the offer price jumped to $387 million while the median sales fell to $15 million, for a market-to-sales ratio of 26. Using the valuation implied by the first closing market price, the market-to-sales ratio is even higher, at 38. This rapid escalation in market-to-sales ratios suggests that valuation uncertainty played a role in increased underpricing over time. In the post-bubble period, the market-to-sales ratio fell back to 2.4, approximately what it was in the 1990s.

Table I. Number of IPOs, First Day Returns, Number of Managing Underwriters, Amount of Money Left on the Table, Valuation Levels, and Sales by Cohort Year

IPOs with an offer price below $5.00 per share, unit offers, REITs, closed-end funds, banks and S&Ls, ADRs, and IPOs not listed on CRSP within six months of issuing are excluded. Data are from Thomson Financial Securities Data, with supplements from Dealogic and other sources, and corrections by authors. The first-day return is defined as the percentage change from the offer price to the closing price. The number of domestic managing underwriters includes both lead underwriters and co-managers. Money on the table is defined as the first-day price change (offer price to close) times the number of shares issued (global offering amount, excluding overallotment options). Both valuation calculations use the post-issue number of shares outstanding. Valuations are computed by multiplying either the offer price or the first closing market price by the post-issue shares outstanding. Sales are for the last 12 months prior to going public, as reported in the prospectus. The mean and median sales are computed for the 6,306 firms for which a sales number is available. All dollar values are in dollars of 2003 purchasing power adjusted using the Consumer Price Index.

Panel A: Means

Year	Number of IPOs	First-Day Return	Number of Managing Underwriters	Millions of 2003 Dollars Money on the Table	Post-Issue Valuation Offer Price	Post-Issue Valuation Market Price	Sales
1980	70	14.7%	1.4	$5.8	$147	$231	$77
1981	191	5.8%	1.5	$11.4	$102	$107	$55
1982	77	11.0%	1.4	$5.5	$111	$124	$41
1983	442	10.1%	1.5	$11.5	$151	$165	$82
1984	172	3.8%	1.5	$2.8	$89	$91	$54
1985	179	6.3%	1.7	$12.2	$183	$194	$102
1986	378	6.3%	1.7	$12.8	$182	$194	$171
1987	271	5.6%	1.8	$11.1	$219	$234	$143
1988	97	5.4%	1.7	[illegible]	$304	$318	$300
1989	105	8.1%	1.6	$13.3	$229	$245	$143
1990	104	10.8%	1.9	$14.4	$214	$224	$348
1991	274	12.0%	2.0	$19.4	$221	$236	$237
1992	385	10.2%	2.0	$17.4	$227	$237	$222
1993	483	12.5%	2.1	$25.4	$269	$304	$285
1994	387	9.8%	2.0	$24.8	$270	$293	$204
1995	434	21.6%	2.3	$12.1	$262	$321	$231
1996	673	16.7%	2.4	$11.3	$236	$392	$160
1997	437	14.0%	2.5	$11.5	$287	$334	$281
1998	268	22.2%	2.9	$22.1	$544	$672	$332
1999	477	71.7%	3.4	$56.2	$590	$1,013	$343
2000	381	56.1%	3.7	$62.3	$965	$1,639	$270
2001	80	13.5%	4.4	$55.9	$2,004	$2,139	$2,130
2002	67	8.9%	4.7	$27.3	$1,347	$1,252	$1,157
2003	63	12.2%	4.0	$18.2	$774	$845	$880
1980–1989	1,922	7.3%	1.5	$10.8	$170	$181	$140
1990–1998	3,398	14.8%	2.3	$13.1	$281	$325	$232
1999–2000	863	65.0%	3.5	$54.7	$921	$1,565	$328
2001–2003	209	11.7%	4.4	$22.1	$1,382	$1,442	$1,320
Total	6,391	18.7%	2.3	$17.4	$361	$474	$243

Table I. Number of IPOs, First Day Returns, Number of Managing Underwriters, Amount of Money Left on the Table, Valuation Levels, and Sales by Cohort Year *(Continued)*

Panel B: Medians

				Millions of 2003 Dollars			
					Post-Issue Valuation		
Year	Number of IPOs	First-Day Return	Number of Managing Underwriters	Money on the Table	Offer Price	Market Price	Sales
1980	[illegible]	[illegible]	1	[illegible]	[illegible]	[illegible]	[illegible]
1981	[illegible]	[illegible]	1	[illegible]	$54	[illegible]	[illegible]
1982	[illegible]	[illegible]	1	[illegible]	[illegible]	[illegible]	[illegible]
1983	[illegible]	[illegible]	1	[illegible]	[illegible]	[illegible]	[illegible]
1984	[illegible]	[illegible]	1	[illegible]	[illegible]	[illegible]	[illegible]
1985	[illegible]	[illegible]	1	[illegible]	[illegible]	[illegible]	[illegible]
1986	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1987	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1988	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1989	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1990	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1991	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1992	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1993	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1994	[illegible]	[illegible]	2	[illegible]	$87	[illegible]	[illegible]
1995	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1996	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1997	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1998	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1999	[illegible]	[illegible]	3	[illegible]	[illegible]	[illegible]	[illegible]
2000	[illegible]	[illegible]	3	$25.3	[illegible]	[illegible]	[illegible]
2001	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	$140
2002	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
2003	65	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1980–1989	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]
1990–1998	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]
1999–2000	[illegible]	[illegible]	3	[illegible]	[illegible]	[illegible]	[illegible]
2001–2003	[illegible]	[illegible]	[illegible]	[illegible]	$504	[illegible]	[illegible]
Total	[illegible]	[illegible]	2	[illegible]	[illegible]	[illegible]	[illegible]

IV. Univariate Sorts

Can the changing characteristics of IPOs, a realignment of incentives, and changing issuer objectives explain the increase in underpricing over time? In this section, we first provide some evidence based on univariate sorts. Table II reports the mean first-day returns on IPOs after several simple sorts for four subperiods: the 1980s, the 1990s, the internet bubble, and the post-bubble period. One can see that some of the cross-sectional patterns in the

1980s reversed in the 1990s. In the 1990s, larger offers were underpriced more than smaller ones, and IPOs with a prestigious lead underwriter were underpriced more than those without.[5]

Table II. Average First-day Returns on IPOs Categorized by Proceeds, Assets, Sales, Age, Industry, VC-backing, Share Overhang, and Underwriter Prestige

Unit offers, REITs, closed-end funds, banks and S&Ls, ADRs, IPOs with an offer price below $5.00, and IPOs not listed on CRSP within six months of the offer date are excluded. Data are from Thomson Financial Securities Data and other sources, with corrections by the authors. The sample size is 6,391 IPOs for 1980-2003. High-prestige underwriters are those with a Carter and Manaster (1990) ranking of 8 or higher on a 9-point scale. Rankings for 1985-1991 are based upon the Carter et al. (1998) rankings. Rankings for 1992-2003 are by the authors. Further descriptions of how age, industry, and underwriter prestige are defined are in the appendices. Firms are classified by proceeds on the basis of whether the global gross proceeds are higher or lower than the median issue size in the prior calendar year, with no adjustment for inflation. Firms with pre-issue assets of less than $40 million (2003 purchasing power) are classified as small. Firms with trailing 12 month sales of $40 million or less (2003 purchasing power) are classified as low sales firms. Share overhang is the ratio of retained shares to the public float. Low share overhang IPOs have an overhang ratio lower than 2.333 (representing a global offer size of 30% or more of the post-issue shares outstanding, if all of the shares in the IPO are issued by the firm). The file price range is missing for 11 firms. Sales is missing for 85 firms. Age is missing for 120 firms, and assets is missing for 223 firms.

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[5] The difference in underpricing of 7.4% for small firms and 7.3% for large firms in the 1980s is lower than found in other studies because we screen out IPOs with an offer price below $5.00 per share. These low price IPOs had an average first-day return of 20.5%, and their inclusion would boost the average return on small IPOs during the 1980s to 8.8%. Low priced IPOs are historically subject to fraud and have been avoided by institutional investors. There has been a decrease in these issues over time partly due to tighter listing requirements on Nasdaq, and partly due to greater regulatory pressures on this part of the IPO market.

	1980-1989		1990-1998		1999-2000		2001-2003	
Segmented by	Return	N	Return	N	Return	N	Return	N
Proceeds								
Small	7.4%	880	12.1%	1 551	32.7%	232	12.4%	77
Large	7.3%	1 102	17.2%	1 245	75.1%	571	11.5%	133
Assets								
Small	9.0%	[illegible]	16.5%	1 5[illegible]	71.6%	459	12.0%	59
Large	4.5%	717	13.1%	1 825	57.2%	344	11.6%	160
Sales								
Low	9.2%	1 003	15.3%	1 541	73.0%	562	12.5%	52
High	5.2%	944	11.7%	1 805	46.6%	241	11.5%	157
Age								
Young (0-7 years old)	9.1%	1 035	17.2%	1 640	78.2%	538	14.6%	72
Old (8 years and older)	5.3%	942	12.7%	1 681	45.2%	263	10.1%	134
Industry								
Tech and internet-related	10.2%	576	22.2%	1 021	80.6%	585	16.4%	60
Non-technology	6.2%	1 406	11.3%	2 315	23.1%	218	9.5%	150
Segmented by venture capital backing								
Not VC-backed	7.1%	1 437	13.5%	2 060	38.5%	316	9.4%	125
VC-backed	8.2%	545	16.1%	1 397	82.2%	487	15.0%	85
Segmented by source of shares offered								
Exclusively sold by firm	7.7%	868	15.5%	1 955	60.4%	681	11.7%	147
Including secondary shares	7.1%	1 114	15.1%	1 396	40.4%	122	11.7%	63
Segmented by share overhang								
Low	7.5%	885	11.8%	1 846	16.1%	134	7.2%	87
High	7.2%	1 097	18.3%	1 5[illegible]	72.7%	669	14.3%	123
Segmented by underwriter prestige								
Low-prestige	8.1%	1 116	12.5%	1 302	35.1%	151	11.2%	45
High-prestige	6.3%	866	16.3%	2 094	71.9%	652	11.5%	165
Segmented by the offer price relative to the file price range								
Revised up	20.6%	246	32.0%	777	119.0%	362	24.3%	42
OP within range	7.3%	1 182	12.3%	1 753	26.8%	296	10.3%	116
Revised down	0.5%	544	4.2%	867	7.9%	145	4.5%	52
All	7.3%	1 982	14.8%	3 390	65.0%	803	11.7%	210

In the 1990s and internet bubble years, IPOs had high returns when a relatively small fraction of the firm was sold in the IPO, as measured by the ratio of retained shares to issued shares, called share overhang by Bradley and Jordan (2002). But this pattern was not present in the 1980s. Several other patterns have increased in magnitude over time. Going across each row in Table II, underpricing uniformly increased until the post- bubble period.

In Table II, during the 1980s, tech stock IPOs had an average first-day return of 10.2%. This is the highest average first-day return of any category during the 1980s except for the set of IPOs whose offer price was revised upward from the file price maximum. If the changing characteristics of IPOs explained all the changes in underpricing across time, it would be hard to imagine that the average first-day return in the 1990s would have increased to much more than 10.2% if the first-day returns were drawn from a stationary distribution.

Barry (1989), Habib and Ljungqvist (2001), and Ljungqvist and Wilhelm (2003) argue that, because the dilution effect hurts selling shareholders more than if they retain their shares, there will be more severe underpricing of pure primary offerings than of IPOs with secondary shares. Table II reports that pure primary offerings were associated with greater underpricing during the internet bubble period, a pattern not present in any quantitatively important manner in the 1980s, 1990s, or the post-bubble period. We now look at some of the patterns in more detail.

A. Age

Figure 2 graphs the average first-day return in each subperiod after classifying firms by their age at the time of going public. In each subperiod, there is more underpricing of young firms than of old firms, although the relation is not strictly monotonic. Our results for the 1980s are consistent with those reported by Muscarella and Vetsuypens (1990).

Even more noteworthy is the increased underpricing, holding age constant, as one moves from the 1980s to the 1990s to the internet bubble period.[6] Thus, Figure 2 shows that the increase in

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[6] The greater variation of average first-day returns during the internet bubble period is due to two features of the data.

(cont'd ...)

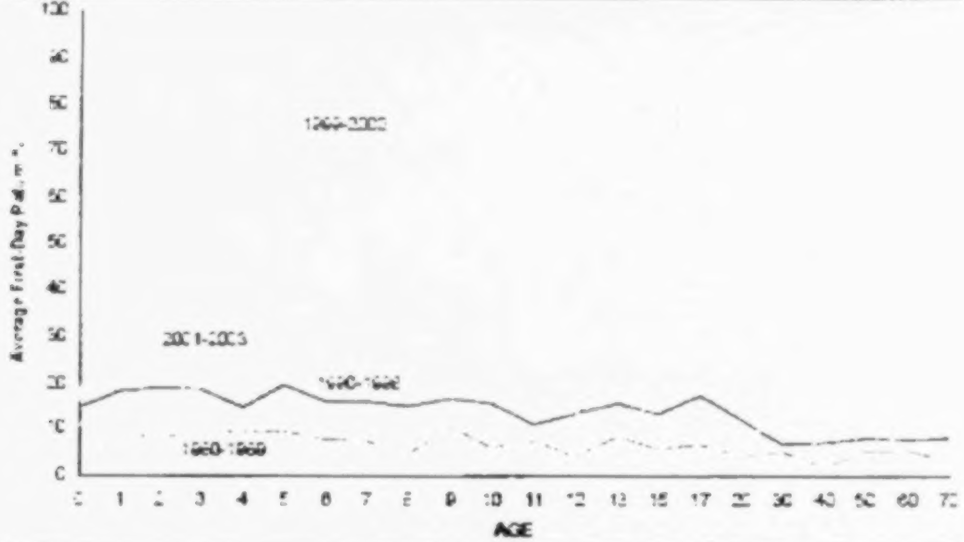
underpricing over time does not occur merely because younger firms are going public. Instead, the relation between age and first-day returns is nonstationary.

Figure 3 plots the 25th, 50th, and 75th percentiles of the age distribution for the IPOs in each cohort year over 1980-2003. Four patterns stand out. First, in the early 1990s, the proportion of young firms dropped. This decline is associated with an increase in the number of "reverse LBOs," firms going public again after a leveraged buyout. Second, in 1999, more young firms went public. This increase is associated with the internet bubble. Third, after the bubble burst, few young firms went public. Fourth, there is no strong secular trend in the age distribution of firms going public. With only temporary aberrations, the median age has stayed remarkably constant at about 7 years. The median age of an issuing firm was 7 years in the 1980s and 8 years in the 1990s, before falling to 5 years during the internet bubble, and then rising dramatically to 12 years during the post-bubble period.

First, the internet bubble period has a smaller sample size, so each age group has fewer firms in it. Second, within each age group, the standard deviation of first-day returns is higher. The post-bubble period patterns are also affected by a very small sample size in most age categories.

Figure 2. Average First-day Returns by Age of Firm at Time of IPO

Average first-day returns on IPOs during 1980-1989 (N = 1,945), 1990-1998 (N = 3,321), 1999-2000 (N = 799), and 2001-2003 (N = 206) by age of firm at the time of its IPO. IPOs with trailing 12-month sales of over $200 million (2003 purchasing power) that are less than two years old are not included, for these are typically spinoffs or reverse LBOs or have the founding dates incorrectly listed as the date of reincorporation in Delaware. The age of the firm is defined as the calendar year of the IPO minus the calendar year of the founding.

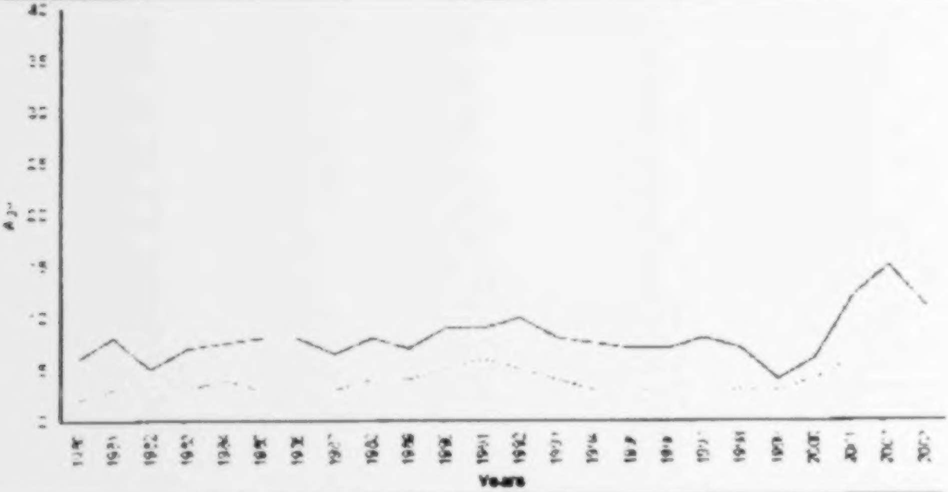


B. CEO Ownership

The realignment of incentives hypothesis posits that issuing firm executives will not bargain as hard for a higher offer price if the CEO owns less of the firm. Ljungqvist and Wilhelm (2003) present regression evidence consistent with this prediction, using the percentage of shares owned by the CEO as the measure of ownership. It is not obvious, however, that CEO percentage ownership is as important as the market value of these shares if we want to measure the managerial benefits of a higher offer price. For a pure primary offering, the opportunity cost to a pre-issue shareholder of underpricing is the dollar value of money left on the table multiplied by the pre-issue fraction of the firm owned by that shareholder. Holding the amount of money left on the table from the sale of primary shares constant, the fractional ownership is the correct measure of the opportunity cost to a CEO. But as our Table I shows, the amount of money left on the table was not constant during 1996-2000.

Figure 3. 25th, 50th, and 75th Percentiles of Firm Age at Time of Going Public by Year of IPO

Each year, companies going public are ranked by firm age. The 25th, 50th (median), and 75th percentiles of this age distribution are then plotted. For example, in 1980, 25% of IPOs were 2 years old or younger, 50% were 6 years old or younger, and 75% were 11 years old or younger. For each subperiod, the 25th, 50th, and 75th percentiles of the age distribution are 3, 7, and 16 years old (the 1980s); 4, 8, and 16 years old (the 1990s); 3, 5, and 9 years old (the internet bubble); and 6, 12, and 26 years old (the post-bubble period). The 25th, 50th, and 75th percentiles of the age distribution at the time of going public for the entire sample of 6,271 IPOs are 4, 7, and 15 years old.



To be explicit, the dollar value of the opportunity cost of underpricing to a CEO, if the offering is entirely primary, is:

opportunity cost_{ceo} = money on the table

$$\left(\frac{N_{ceo}}{N_o}\right) = N_n \cdot (P - OP) \cdot \left(\frac{N_{ceo}}{N_o}\right) \qquad (2)$$

where N_{ceo} is the number of shares owned by the CEO, N_o is the pre-issue number of shares outstanding, N_n is the number of newly issued (primary) shares, P is the first closing market price, and OP is the offer price per share. Ljungqvist and Wilhelm (2003) emphasize that the CEO ownership fraction N_{ceo}/N_o was lower during the bubble period than in previous years. But it is also the case that N_n was much higher, while the distribution of nominal offer prices did not change much.

Table III tabulates the median pre-issue CEO percentage ownership reported by Ljungqvist and

Wilhelm (2003) for 1996-2000 and an estimate of the pre-issue number of shares owned by the CEO for

Table III. Pre-Issue CEO Ownership in Dollar Values and Percentage, 1996-2000

The median pre-issue number of CEO shares is computed as the product of the median pre-issue number of shares outstanding and the median pre-issue % CEO ownership. This should be viewed as an approximation of the actual median pre-issue number of CEO shares. The median pre-issue % CEO ownership is from Ljungqvist and Wilhelm (2003, Table III). The median CEO pre-issue dollar value is computed as the product of the prior two columns, and is also an approximation of the actual median. Neither the median offer price nor the median market value (median pre-issue number of CEO shares times the median offer price) is adjusted for price level changes (inflation). Inflation averaged less than 3% per year during this period.

Year	Number of IPOs	Median Pre-Issue Number of CEO Shares	Median Offer Price	Median CEO Pre-Issue Dollar Value, Millions	Median Pre-Issue % CEO Ownership
1996	623	723,591	$12.00	$8.68 m	10.4%
1997	437	880,401	$11.75	$10.34 m	12.5%
1998	268	1,165,677	$12.50	$14.56 m	11.8%
1999	457	1,394,336	$14.00	$19.52 m	8.0%
2000	346	1,554,172	$14.00	$21.76 m	5.5%

the median company going public in a year, computed as the product of the median CEO fractional ownership times the median pre-issue shares outstanding. We also report the median offer price in each year and an approximation of the median dollar value of shares owned by CEOs, valued at the offer price.[7]

Inspection of Table III shows that, while CEO percentage ownership decreased during 1996-2000, the number of shares owned more than doubled because of the number of shares outstanding quadrupled. This dramatic increase in pre-issue shares outstanding is attributable to the substantial increase in valuations along with a relatively constant offer price. Thus, the median CEO's market value of equity rose, even though the fractional holdings fell. If one were to focus on the market value of the shares owned by the CEO when the firm went public, the realignment of incentives hypothesis predicts a *decrease* in underpricing during the bubble period due to the incentive effect. Wealth effects associated with the higher market value of the shares might dominate substitution effects, however, making predictions hazardous, as Ljungqvist and Wilhelm acknowledge. In any case, the substantial increase during 1996-2000 in CEO dollar holdings is in sharp contrast to the decline in CEO holdings when ownership is measured as a percentage of shares outstanding.

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[7] Alexander Ljungqvist has computed the value of the median CEO's pre-issue market value of equity, using the Ljungqvist and Wilhelm sample, which is virtually identical to ours for the 1996-2000 period. His numbers for the median market value each year show the same trend that we report in Table III, where we multiply the product of several medians. Ljungqvist's pre-issue market value of equity for the median CEO increases from $6.76 million in 1996 to $20.64 million in 1999 before declining to $16.86 million in 2000, while our Table III medians increase from $8.68 million in 1996 to $21.76 million in 2000.

C. Prestigious Underwriters

In general, underwriters with a Carter and Manaster rank of 8.0 to 9.0 (on a scale of 0 to 9) are considered to be prestigious national underwriters. Those with a rank of 5.0 to 7.9 are considered to be quality regional or niche underwriters. Underwriters with a rank of 0 to 4.9 are generally associated with penny stocks; many with ranks of 3.0 or lower have been charged by the SEC with market manipulation. In Table IV, we categorize IPOs on the basis of lead underwriter prestige. Inspection of the sample sizes shows that prestigious lead underwriters increased their market share from under 50% in the 1980s to over 60% in the 1990s, and then to about 80% during the internet and post-bubble periods.[8]

Beatty and Welch (1996), Cooney, Singh, Carter, and Dark (2001), and others have documented that a negative relation between underwriter prestige and underpricing in the 1980s reversed itself in the 1990s, although the authors offer no explanation for the reversal. Our Table IV findings confirm this reversal. To rationalize the pattern of the 1980s that prestigious underwriters are associated with less underpricing, Carter and Manaster (1990) and Carter et al. (1998) argue that IPOs taken public by prestigious underwriters benefit from superior certification. Because of the greater reputation capital that is committed, investors do not demand as large a discount on these offers. The higher underpricing associated with prestigious underwriters in the 1990s and the internet bubble period is inconsistent with the joint hypothesis that underwriters are attempting to maximize issuer proceeds and that certification is an important determinant of the required amount of money left on the table. Instead, it is consistent with the changing issuer objective function hypothesis.

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[8] Since in all subperiods the biggest deals are more commonly managed by prestigious underwriters, if market share is computed using gross proceeds rather than the number of IPOs, the market share of prestigious underwriters would be uniformly higher.

If issuers became more willing to hire underwriters with a history of underpricing after the 1980s, this could occur either because of a shift in which underwriters were hired, or a shift in the behavior of the underwriters. That is, underwriters, especially those with influential analysts and a willingness to allocate hot IPOs to the personal brokerage accounts of issuing firm decision-makers, could have changed their pricing policies in order to leave more money on the table. The evidence suggests that most of the shifts occurred via changes in the behavior of individual underwriters, rather than shifting market shares. For example, for IPOs with Goldman Sachs as the bookrunner, the average underpricing was 5.0% in the 1980s, 23.8% in the 1990s, 99.8% during the bubble, and 11.0% during the post-bubble period.

Table IV shows that over time, especially in the internet bubble period, prestigious underwriters relaxed their underwriting standards and took public an increasing number of very young and unprofitable companies. The median sales of firms taken public by prestigious underwriters dropped from $80 million in the 1980s to just $17 million during the internet bubble period.

Tables II and IV also report changes over time in the fraction of IPOs with upward revisions of the offer price relative to the file price range. Table II reports that, in the 1980s, it was twice as likely to see a downward revision as an upward revision, and in the bubble period, the proportion of upward revisions was much higher. This cannot be accounted for by differences in returns on the Nasdaq Composite in the three weeks prior to issuing. In the first three subperiods, the average three-week return immediately prior to issuing was about 1%, although in the post-bubble period it was only 0.54%.

Our analyst lust hypothesis can explain the changes over time that are documented in Table IV. In the 1980s, investment bankers competed for IPO underwriting mandates more on the basis of implied valuations and less on the basis of analyst coverage (because α_1 of Equation (1) was higher in the 1980s). If an underwriter indicated it would price a firm higher than the competition, it was likely to be chosen. But in winning the mandate, the underwriter implicitly committed to a higher file price range, leaving less room to avoid a downward revision if market conditions weakened. Investment bankers tell us that managing "issuer expectations"

Table IV. Mean and Median First-day Returns, Median Age, Sales, EPS, and Share Overhang, and Industry Representation Categorized by Underwriter Prestige

Unit offers, REITs, closed-end funds, banks and S&Ls, ADRs, and IPOs not listed on CRSP within six months of the offer date are excluded. Data are from Thomson Financial Securities Data, Dealogic, and other sources. High-prestige underwriters are those with a Carter and Manaster (1990) ranking of 8 or higher on a 9-point scale. Rankings for 1984 and later are based upon the Carter et al. (1998) rankings and updates by the authors of this paper. See Appendix C for details. Sales are measured in millions of dollars of year 2003 purchasing power, using the Consumer Price Index. Share overhang is the ratio of retained shares to the public float. Percentage tech is the percentage of IPOs that are classified as technology or internet-related, as defined in Appendix D. The sample size is 6,391 IPOs over 1980-2003, except for age, sales, EPS, and offer price revision, where some observations are lost due to missing information.

	1980-1989		1990-1998		1999-2000		2001-2003	
	Return	**N**	**Return**	**N**	**Return**	**N**	**Return**	**N**
Mean first-day returns								
Low prestige	9.1%	1,119	12.9%	1,302	39.1%	151	12.2%	45
High prestige	6.1%	863	15.9%	2,094	71.9%	652	11.5%	165
Median first-day returns								
Low prestige	2.5%	1,119	7.1%	1,302	12.2%	151	11.1%	45
High prestige	1.2%	863	8.7%	2,094	37.5%	652	8.3%	165
Median Age								
Low prestige	6 years	1,115	7 years	1,298	5 years	151	9 years	45
High prestige	9 years	849	8 years	2,056	5 years	649	14 years	162
Median trailing sales (millions)								
Low prestige	$21.5	1,086	$22.8	1,268	$9.1	150	$44.1	45
High Prestige	$80.2	861	$71.7	2,052	$17.3	650	$269.4	164
Median trailing 12-month EPS								
Low prestige	$0.38	1,099	$0.25	1,302	-$0.55	151	-$0.25	45
High prestige	$0.59	855	$0.27	2,094	-$1.18	652	$0.02	165
Median share overhang								
Low prestige	2.28	1,119	1.96	1,302	2.91	151	2.30	45
High prestige	2.82	863	2.44	2,094	4.31	652	2.97	165
Percentage with an offer price above the maximum of the file price range								
Low prestige	8%	1,120	11%	1,302	28%	151	6%	45
High prestige	17%	861	30%	2,094	40%	652	23%	165
Percentage tech and internet-related								
Low prestige	30.6%	1,119	28.3%	1,302	68.9%	151	33.3%	45
High prestige	27.1%	863	34.0%	2,094	72.8%	652	27.3%	165
All	7.3%	1,982	14.8%	3,396	65.0%	803	11.7%	210

is part of their job. In the 1990s, underwriters with star analysts could win a mandate without committing to a high valuation that issuers would anchor their expectations on. In the bubble period, this was taken to an extreme; many issuers accepted a low file price range because they were more focused on choosing an underwriter with an influential analyst or with underpriced IPOs to allocate to an executive's personal brokerage account than on getting a high valuation.

The academic literature generally views the midpoint of the file price range as an unbiased estimate of the offer price, and revisions in the offer price as reflecting unanticipated strong or weak demand. Houston, James, and Karceski (2004) report that during the bubble period, the file price range was low-balled relative to the value implied by comparable firm multiples. During the internet bubble, Donaldson Lufkin Jenrette and Goldman Sachs, among others, low-balled the file price range on some IPOs in what DLJ refers to as a "walkup" strategy in its "pitchbook" for the August 2000 Viasource IPO.

In the early 1980s, many underwriters were thinly capitalized firms where risk-sharing was important. On a $50 million deal with a 7% gross spread, the underwriters shared $3.5 million in fees. The lead underwriter might get 20% of this, or $0.7 million. As underwriters grew larger, the lead manager was able to keep 60% of the fees, or $2.1 million. Furthermore, with more money left on the table, the lead underwriter could get *quid pro quos* that might be worth another $2.1 million. So it became a lot more lucrative to be the lead underwriter. To get this business, it was important to have an analyst who would be bullish. Issuers were willing to pay higher indirect fees due to both the analyst lust hypothesis and the spinning hypothesis. The time series evidence is consistent with this story, but what about cross- sectional implications?

V. Multiple Regression Results

One explanation for the cross-sectional pattern between age and first-day returns is that younger firms are riskier firms, and investors need to be compensated for this risk. The negative relationship between sales and first-day returns reported in Table II also can be interpreted as demonstrating a relation between the risk of an IPO and underpricing. The univariate sorts in Tables II and IV, however, are not independent. Tech firms are much more likely to be young firms, for instance. Thus, to examine marginal effects, we report multiple regression results with first-day return as the dependent variable. Our explanatory variables are chosen on the basis either of their association with first-day returns in our univariate sorts, or to test the changing risk composition, realignment of incentives, and changing issuer objective function hypotheses.

A. Ordinary Least Squares Regression Results

In the first and second rows of Table V, we use a total of 15 explanatory variables: a Carter-Manaster top-tier underwriter dummy (set equal to one if the lead underwriter has a rank of 8 or more, and zero otherwise), the logarithm of assets, a tech stock dummy, an internet stock dummy, the logarithm of (1 + age), share overhang (the ratio of retained shares to issued shares), a VC dummy, a pure primary offering dummy, the logarithm of sales, a dummy variable for IPOs in 1990-1998, a dummy variable for IPOs in 1999-2000, a dummy variable for IPOs in 2001-2003, and interaction terms between the Carter-Manaster top-tier underwriter dummy and the time period dummy variables. Both assets and sales are measured in millions of dollars of 2003 purchasing power. The regression is:

$\text{First-Day Return}_i = a_0 + a_1\text{Top-Tier Underwriter Dummy}_i + a_2\ln(\text{Assets})_i + a_3\text{Tech Dummy}_i$

$+ a_4\text{Internet Dummy}_i + a_5\ln(1 + \text{Age})_i + a_6\text{Overhang}_i + a_7\text{VC Dummy}_i$

$$+ a_8\text{Pure Primary Dummy}_i + a_9\ln(\text{Sales})_i + a_{10}\text{Top-Tier Dummy}\cdot\text{Nineties Dummy}_i + a_{11}\text{Top-Tier Dummy}\cdot\text{Bubble Dummy}_i + a_{12}\,\text{Top-Tier Dummy}\cdot\text{Post Dummy}_i + a_{13}\text{Nineties Dummy}_i + a_{14}\text{Bubble Dummy}_i + a_{15}\text{Post Dummy}_i + e_i$$

The variables ln(assets), tech stock dummy, internet dummy, ln(1 + age), and ln(sales) measure changing risk composition. The pure primary dummy is a measure of the realignment of incentives, with a predicted positive coefficient.

Table V. Regressions of Percentage First-Day Returns on Several Variables and Interaction Terms

The sample in row 1 includes 5,990 US operating firm IPOs over 1980-2003 where the offer price is at least $5.00 and complete data on all of the variables is available. The subperiods have, respectively, 1,752, 3,235, 797, and 206 observations. The dependent variable in all regressions is the percentage first-day return from the offer price to the first-day closing price. The top-tier underwriter dummy takes a value of one if the lead underwriter has an updated Carter and Manaster (1990) rank of 8 or more, and zero otherwise. Ln(assets) is the natural logarithm of the pre-issue book value of assets, expressed in millions of dollars of 2003 purchasing power using the CPI. The tech dummy takes a value of one (zero otherwise) if the firm is in the technology business, and the internet dummy is similarly defined (industries are defined in Appendix D). Ln(1 + age) is the natural log of 1 plus the years since the firm's founding date as of the IPO. Share overhang is the ratio of retained shares to the public float (the number of shares issued). The VC dummy takes a value of one (zero otherwise) if the IPO is backed by venture capital. The pure primary dummy equals one (zero otherwise) if the offering is 100% primary (i.e., no secondary shares sold). Ln(sales) is the natural log of the trailing annual firm sales, expressed in millions of dollars of 2003 purchasing power. The nineties dummy takes a value of one (zero otherwise) if the IPO occurred during 1990-1998. The bubble dummy takes a value of one (zero otherwise) if the IPO occurred during 1999-2000. The post dummy takes a value of one (zero otherwise) if the IPO occurred during 2001-2003. The interaction terms multiply the top-tier underwriter dummy by the time period dummies. The t-statistics (in parentheses) are calculated using White's (1980) heteroskedasticity-consistent method.

$\text{First-Day Return}_i = a_0 + a_1\text{Top-Tier Underwriter Dummy}_i + a_2\text{ln(Assets)}_i + a_3\text{Tech Dummy}_i + a_4\text{Internet Dummy}_i + a_5\text{ln}(1 + \text{age})_i + a_6\text{Overhang}_i + a_7\text{VC Dummy}_i + a_8\text{Pure Primary Dummy}_i + a_9\text{ln(Sales)}_i + a_{10}\text{Top-Tier Dummy}\cdot\text{Nineties Dummyi} + a_{11}\text{Top-Tier Dummy}\cdot\text{Bubble Dummy}_i + a_{12}\text{Top-Tier Dummy}\cdot\text{Post Dummy}_i + a_{13}\text{Nineties Dummy}_i + a_{14}\text{Bubble Dummy}_i + a_{15}\text{Post Dummy}_i + e_i$

Period	Inter.	Top-Tier Underwriter Dummy	Ln (Assets)	Tech Dummy	Internet Dummy	Ln (1 + age)	Share Overhang	VC Dummy	Pure Primary Dummy	Ln (Sales)	Top-Tier Dummy Nineties Dummy	Top-Tier Dummy Bubble Dummy	Top-Tier Dummy Post Dummy	Nineties Dummy	Bubble Dummy	Post Dummy	R^2_{adj}
(1) All	2.33 (1.57)	1.76 (3.47)	-2.47 (-5.21)	5.53 (4.96)	34.43 (7.06)	-1.26 (-3.53)	3.62 (8.09)	-1.92 (-1.81)	1.17 (1.47)	0.42 (1.12)				3.66 (14.06)	31.46 (11.04)	5.36 (3.60)	0.238
(2) All	4.45 (3.69)	-2.50 (-2.66)	-2.36 (-5.11)	5.56 (4.67)	34.96 (7.22)	-1.18 (-3.31)	3.54 (8.67)	-1.78 (-1.66)	1.67 (2.17)	0.42 (1.17)	5.05 (4.60)	16.25 (6.17)	5.29 (1.53)	6.32 (3.33)	6.69 (1.26)	3.34 (1.07)	0.240
(3) 1980-1989	12.42 (3.80)	-1.77 (-2.24)	-0.75 (-2.02)	2.44 (2.62)	-4.06 (-0.90)	-0.96 (-2.40)	0.16 (0.79)	0.30 (0.30)	0.36 (0.95)	-0.25 (-0.69)							0.032
(4) 1990-1998	15.43 (11.39)	3.32 (3.39)	-1.31 (-4.65)	5.46 (5.21)	31.28 (3.47)	-1.11 (-3.94)	2.76 (7.57)	-1.92 (-1.83)	-1.25 (-1.96)	0.05 (0.16)							0.132
(5) 1999-2000	16.68 (-1.59)	21.22 (3.11)	-5.06 (-2.96)	16.96 (2.44)	25.02 (3.72)	-0.92 (-0.29)	9.35 (6.65)	21.46 (3.42)	5.56 (1.06)	2.16 (1.32)							0.196
(6) 2001-2003	8.41 (2.12)	1.29 (0.46)	-0.97 (-1.46)	5.26 (1.91)	-3.25 (-0.57)	-1.35 (-1.15)	2.21 (4.01)	4.07 (1.65)	2.41 (1.13)	1.06 (2.42)							0.118

The changing issuer objective function hypothesis is tested by the change over time in the coefficients on the top-tier underwriter dummy. Our hypothesis is that, ceteris paribus, IPOs underwritten by top-tier underwriters were underpriced more in the 1990s and, especially, in the bubble period because of spinning and because they had more highly ranked analysts. We use a top-tier Carter-Manaster ranking as a proxy for all-star analyst presence and the ability and willingness to spin. It should be noted that the vast majority of *Institutional Investor* all-star analysts are employed by top-tier underwriters, which we define as investment bankers with a Carter-Manaster rank of 8 or higher.

Several variables capture the predictions of multiple hypotheses. For example, all three hypotheses are consistent with a positive coefficient on overhang, because the opportunity cost of underpricing is lower, the lower is the fraction of the firm sold (and thus the greater the overhang), and small proportionate offerings are associated with high valuations.

The slope coefficients in the row 1 regression are generally consistent with the univariate results reported earlier, although the lack of significance for the VC dummy and ln(sales) suggests that correlations between variables drive some of the univariate patterns. The negative coefficients on ln(assets) and ln(1 + age), and the positive coefficients on the tech and internet dummies, are consistent with the changing risk composition hypothesis, given that the bubble period saw a higher proportion of IPOs by young tech and internet firms than other periods. The negative and insignificant coefficient on the pure primary dummy is not consistent with the realignment of incentives hypothesis.

Recall that the average first-day return increased from 7.3% in the 1980s to 14.8% in the 1990s, 65.0% during the internet bubble, and 11.7% in the post-bubble period. We seek to explain these increases: 7.5 percentage points from the 1980s to the 1990s, 57.7 percentage points from the 1980s to the internet bubble, and 4.4 percentage points from the 1980s to the post-bubble period. In Table V, the row 1 coefficient on the nineties dummy of 8.86, or 8.86%, suggests that none of the increase in underpricing from the 1980s to the 1990s has been explained. The coefficient on the bubble dummy variable of 33.49 implies that only some of the 57.7% difference in underpricing between the 1980s and the internet bubble period is accounted for. And the coefficient of 5.39 on the post-bubble dummy variable suggests that the variables are not adequate to explain the difference in underpricing between the 1980s and the post-bubble period as well.

In row 2, we add three explanatory variables allowing a shift in the top-tier underwriter dummy coefficient over time. Specifically, we add three interaction terms by multiplying the top-tier underwriter dummy by the time period dummies. As the changing issuer objective function hypothesis would predict, all three of these interaction variables have positive coefficients in row 2, and the shifts in the 1990s and bubble periods are statistically significant. In row 2, the coefficient on the nineties dummy of 6.82 (6.8%) indicates that we are still unable to explain the unconditional difference in underpricing between the 1980s and 1990s of 7.5%. Most importantly, however, the coefficient on the bubble dummy falls to a statistically insignificant 6.66 (6.7%). Since the unconditional difference in underpricing between the 1980s and the bubble period is 57.7%, the row 2 regression is able to account for the vast majority of the extra underpricing associated with the bubble period. The same is true for the post-bubble dummy, where the coefficient of 3.34 (3.3%) is statistically indistinguishable from both zero and the unconditional difference in underpricing of 4.4%. Hence, the shift in the top-tier underwriter variable can explain all of the increase in first-day returns between the 1980s and the bubble and post-bubble time periods.

Thus, the coefficients on the time period dummies in row 1 suggest that neither the changing risk composition hypothesis nor the realignment of incentives hypothesis is able to explain much of the unconditional changes in underpricing over time. On the other hand, when we introduce variables suggested by the changing issuer objective function hypothesis in row 2, the bubble period dummy drops to a statistically insignificant 6.66%, although the inability to explain the higher underpricing in the 1990s remains.

Rows 3-6 present subperiod results. The top-tier underwriter dummy coefficient is reliably negative in the 1980s, positive in the 1990s, very positive in the bubble period, and insignificant in the post-bubble period. In the bubble period, the coefficient on the top-tier underwriter dummy is 21.22. This implies that IPOs with a top-tier lead underwriter had 21.2%

higher first- day returns than IPOs with less prestigious bankers, after adjusting for other factors.

This increase in underpricing associated with prestigious underwriters in the 1990s and the bubble period is a test of the changing issuer objective function hypothesis. Also consistent with this hypothesis is the increasing market share of top-tier underwriters reported in Tables II and IV. As we have argued, issuer decision-makers were willing to pay for their services by leaving money on the table because of the side payments and the positive analyst coverage that they or their companies received.

Inspection of the subperiod results in rows 3-6 of Table V shows that the parameter estimates on all of the explanatory variables except ln(1 + age) have changed over time. This nonstationarity suggests that increased underpricing over time is not attributable entirely to an increase in the fraction of IPOs by riskier companies or a realignment of incentives, unless, for example, an omitted variable bias has different effects in different subperiods.

B. Instrumental Variable Regression Results

Habib and Ljungqvist (2001), Fernando, Gatchev, and Spindt (2004), and others argue that the prestige of the lead underwriter is endogenous in regressions with underpricing as the dependent variable. Habib and Ljungqvist (2001) deal with this by running two-stage least squares regressions for underpricing, where rather than using the Carter-Manaster underwriter prestige rank, they use the predicted rank from a first-stage OLS regression. In Table VI, we report underpricing regression results after controlling for the endogeneity of underwriter choice by using an instrument for the Carter-Manaster underwriter rank. Our qualitative conclusions are not substantially altered.

In Panel A of Table VI, the first-stage OLS regression for underwriter rank has as explanatory variables ln(assets), a tech dummy, an internet dummy, ln(1 + age), share overhang, a VC dummy, a pure primary dummy variable, ln(sales), and age/assets.[9] In rows 1 and 2 of our Table V regressions, the pure primary dummy, the VC dummy, and ln(sales) were weakly related at best to first-day returns. In Panel A of Table VI, these three variables are strongly related to underwriter rank, except for the post-bubble subperiod, where a small sample size limits the statistical significance of all variables.

In Panel B of Table VI, we report regression results with underpricing as the dependent variable. In row 6, we report OLS regression coefficients. In row 7, we report regression coefficients from the second-stage regression using the predicted value of underwriter rank to construct the top-tier underwriter dummy instrument. That is, if the predicted Carter-Manaster rank is 8 or higher, the predicted value of the top-tier underwriter dummy is one, and zero otherwise.

Both rows 6 and 7 use the entire 24-year sample period, and a comparison of the two rows shows that controlling for the endogeneity of underwriter choice does not substantially alter the conclusions drawn from Table V. Both the 1990s and the post-bubble dummy variables have approximately the same

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[9] For IPOs with an age-to-assets ratio higher than one, we set the ratio value at one.

Table VI. Regressions of Percentage First-Day Returns on an Instrument for Top-tier Underwriter Dummy, Ln(Assets), Tech Dummy, Internet Dummy, Ln(1 + age), and Share Overhang

Variables are defined in Table V. Values of the age/assets ratio greater than one are set equal to one. The regressions use 5,990 IPOs from 1980-2003, and 1,752, 3,235, 797, and 206 IPOs, respectively, in the subperiods. Panel A reports first-stage OLS regressions with the Carter-Manaster underwriter rank (as updated) as the dependent variable. In Panel B, row 6 reports an OLS regression with the first-day return as the dependent variable. Rows 7-11 report second-stage regressions where the predicted value of the top-tier underwriter dummy from the corresponding first-stage regression is used as an instrument. Thus, if the predicted Carter-Manaster rank is 8 or above, the top-tier underwriter dummy instrument is set equal to one, and zero otherwise. For example, the row 8 regression for the 1980s uses the predicted value of the row 2 regression as the underwriter rank instrument. The top-tier instruments in row 7 of panel B use the subperiod-specific regressions in rows 2-5 of panel A. The t-statistics (in parentheses) are calculated using White's (1980) heteroskedasticity-consistent method.

$UWRank_i = a_0 + a_1 ln(Assets)_i + a_2 Tech\ Dummy_i + a_3 Internet\ Dummy_i + a_4 ln(1 + age)_i + a_5 Overhang_i + a_6 VC\ Dummy_i + a_7 Pure\ Primary\ Dummy_i + a_8 ln(Sales)_i + a_9 Age/Assets_i + e_i$

$First\text{-}Day\ Return_i = a_0 + a_1 Top\ Tier\ Dummy_i + a_2 ln(Assets)_i + a_3 Tech\ Dummy_i + a_4 Internet\ Dummy_i + a_5 ln(1 + age)_i + a_6 Overhang_i + e_i$

Panel A. First-Stage OLS Regressions with Underwriter Rank as the Dependent Variable

Period	Inter.	Ln(Assets)	Tech Dummy	Internet Dummy	Ln(1+ age)	Share Overhang	VC Dummy	Pure Primary Dummy	Ln(Sales)	Age/ Assets	R^2_{adj}
(1)	[illegible]	0.42	0.28	[illegible]	0.26	0.10	0.96	-0.52	0.09	[illegible]	0.430
All	(39.14)	(13.56)	[illegible]	(10.82)	(8.24)	(6.64)	(21.59)	(-11.49)	(4.90)	(-9.57)	
(2)	4.18	0.55	0.11	-0.44	0.19	0.01	0.89	-0.55	0.10	-0.85	0.465
1980-1989	(21.20)	(8.96)	(3.36)	(-2.14)	(7.12)	(0.70)	(9.20)	(-6.61)	(2.46)	(-4.06)	
(3)	4.32	0.44	0.20	0.57	0.21	0.15	1.04	-0.64	0.11	-1.12	0.425
1990-1998	(21.82)	(8.96)	(2.77)	(2.91)	(5.40)	(6.66)	(16.12)	(-10.40)	(4.49)	(-6.45)	
(4)	5.99	0.17	0.12	0.01	0.26	0.06	0.97	-0.02	0.06	-1.18	0.348
1999-2000	(18.51)	(3.49)	(1.29)	(0.13)	(2.06)	(5.01)	(8.10)	(-0.15)	(2.49)	(-4.22)	
(5)	7.29	0.11	0.19	-0.19	0.30	0.09	0.25	-0.04	-0.06	-2.92	0.355
2001-2003	(16.59)	(1.34)	(0.95)	(-0.64)	(2.90)	(2.00)	(1.30)	(-0.39)	(-1.79)	(-4.40)	

Table VI. Regressions of Percentage First-Day Returns on an Instrument for Top-tier Underwriter Dummy, Ln(Assets), Tech Dummy, Internet Dummy, Ln(1 + age), and Share Overhang
(Continued)

[illegible]

Period	Inter.	Top-Tier Underwriter Dummy	Ln(Assets)	Tech Dummy	Internet Dummy	Ln(1 + age)	Share Overhang	Top-Tier Dummy · Nineties Dummy	Top-Tier Dummy · Bubble Dummy	Top-Tier Dummy · Post Dummy	Nineties Dummy	Bubble Dummy	Post Dummy	$\bar{R}^2_{adj}$
(6)	4.90	-1.86	-2.08	6.16	34.92	-0.96	3.4	5.10	36.05	4.53	6.4	5.96	3.13	0.296
All, OLS	(3.96)	(-2.10)	(-4.95)	(5.61)	(7.25)	(-2.36)	(0.86)	(4.67)	(6.13)	(1.30)	(2.62)	(1.15)	(1.07)	
(7)	6.56	1.04	-2.09	5.03	33.75	-0.93	3.38	3.49	22.6	9.96	8.52	18.50	4.11	0.290
All	(4.56)	(0.89)	(-5.01)	(5.07)	(6.98)	(-2.36)	(0.95)	(3.41)	(4.24)	(3.01)	(12.21)	(4.57)	(14.04)	
(8)	12.54	0.96	-1.78	2.36	-4.98	-0.96	0.12	.		.	.	.		0.015
1980–1989	(9.86)	(1.03)	(-4.19)	(2.69)	(-0.94)	(-2.71)	(0.90)							
(9)	10.16	3.76	-1.86	5.43	31.17	-1.22	2.57	.	.	.	.	.		0.125
1990–1998	(6.67)	(3.19)	(-5.46)	(5.44)	(13.34)	(-3.72)	(2.31)							
(10)	14.93	23.85	-5.25	17.16	28.36	-1.00	9.47	.	.	.	.	.		0.184
1999–2000	(1.06)	(3.61)	(-4.31)	(2.87)	(3.57)	(-0.32)	(6.67)							
(11)	7.20	1.05	-6.52	6.33	-6.64	-0.45	2.01	.	.	.	.	.	.	0.064
2001–2003	(2.09)	(6.32)	(-6.33)	(2.39)	(-6.12)	(-0.41)	(3.01)							

coefficient values in rows 6 and 7, but there is a difference between the rows in terms of the bubble dummy coefficient. Row 6 (OLS) reports an insignificant coefficient of 5.99 while the row 7 second-stage regression has a coefficient of 18.51. This is still much closer to zero than the 57.7% unconditional difference in underpricing, however.

Rows 8-11 report subperiod results for the instrumented regressions, which are analogous to the OLS regressions in rows 3-6 of Table V. Controlling for the endogeneity of underwriter choice has no impact on our qualitative conclusions, except that for the 1980s the coefficient on the top-tier underwriter dummy changes from negative to insignificantly positive.

VI. Alternative Explanations for the Underpricing of Internet Stocks

Many alternative explanations have been advanced for the severe underpricing of IPOs during the internet bubble.[10] One view is that many issuers were more concerned with the market price at lockup expiration than with what the offer price was. Developing this idea, Aggarwal, Krigman, and Womack (2002) argue that severe underpricing generates "information momentum," resulting in a higher market price at the end of the lockup period when insiders typically sell some of their shares. While this may be true, it is not clear that the benefits to the issuing firm exceed the opportunity cost associated with the increased dilution from underpricing the IPO. Nevertheless, we are comfortable with the notion that during the internet bubble issuers placed less weight on IPO proceeds and more weight on the proceeds from future insider sales and follow-on offerings than they did in prior periods. This, after all, is part of the analyst lust hypothesis.

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[10] DuCharme, Rajgopal, and Sefcik (2001), Schultz and Zaman (2001), and Ofek and Richardson (2003), among others, examine various hypotheses for the high underpricing of US internet stocks. Arosio, Giudici, and Paleari (2001) present evidence for the severe underpricing of European internet stocks.

During the internet bubble, there were widespread concerns about the valuation of internet stocks. One explanation for the severe underpricing of internet IPOs is that underwriters were unwilling to price these offerings at the level that the market was willing to pay out of concern about lawsuits and damage to reputation if and when the stocks eventually dropped in price. The argument is that unsophisticated day traders and others were bidding up the price to unjustified levels, and the underwriters were unwilling to price the IPOs at the market price determined by these "noise traders."

In untabulated results, we do not find a negative relation between first-day returns and subsequent performance in either the 1980s or the 1990s, but we do find reversals during the internet bubble.[11] For

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[11] Logue, Rogalski, Seward, and Foster-Johnson (2002) for IPOs in 1988-1995 and Houge, Loughran, Suchanek, and Yan (2001) for IPOs in 1993-1996 find a slight negative relation between first-day returns and subsequent three-year stock performance. Lowry (2003) finds no relation for IPOs in 1973-

(cont'd ...)

example, of the 19 IPOs with a first-day return of more than 300% during the internet bubble, the average buy-and-hold return from the first closing price until the end of December 2002 is—95.0%.[12] Measured from the offer price, the average return through December 2002 (or the delisting date, if earlier) is—73.7% for these 19 IPOs, compared to—43.5% for the other bubble period IPOs. This evidence is consistent with the idea that overoptimistic investor sentiment temporarily inflated the market prices on these IPOs.

We are skeptical of this explanation for severe underpricing, however, for if underwriters were concerned that the market prices on internet stocks were too high, presumably their analyst recommendations after the end of the quiet period would have been bearish. Bradley, Jordan, and Ritter (2003), Cliff and Denis (2004), and Houston, James, and Karceski (2004) find this is in fact not the case.

The poor subsequent performance of IPOs with high first-day returns in the bubble period is also

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1996, and Loughran and Ritter (2002) find no relation for IPOs in 1990-1998.

[12] The only one of these 19 IPOs that did not decline by more than 90% from the first-day close through December 2002 is Cobalt Networks, which was acquired in December 2000 after falling by 65.1%. Measured from the first closing price to 180 calendar days later, the average return was–46.8%. The bookrunners (with partial credit given for joint bookrunners) on these 19 IPOs were SG Cowen for 1, CSFB for 3, Deutsche Bank for 1.5, Donaldson Lufkin Jenrette for 0.5, Goldman Sachs for 1.5, Merrill Lynch for 2, Morgan Stanley for 8.5, and Robertson Stephens for 1.

consistent with a less innocuous explanation, however. As is typical in the academic IPO literature, we have taken the first closing market price as exogenous. Yet Smith and Pulliam (2002) state that:

> [T]he Securities and Exchange Commission is examining whether some securities firms coerced investors who got hot IPO shares into placing orders for the same stocks at higher prices on the first day of trading, as a condition of getting the IPOs. That practice, known as "laddering," contributed to the huge one-day run-ups in many IPOs during the tech-stock mania. The SEC's laddering probe has focused on firms including Goldman Sachs Group Inc., Morgan Stanley, Robertson Stephens and J.P Morgan Chase.

On October 1, 2003, J.P. Morgan Chase settled with the SEC, paying a $25 million fine.

Investors would be willing to buy these additional shares in the aftermarket if the sum of the profits from the IPO allocation they received and the aftermarket purchases were positive (calculated using the weighted average purchase price). In many cases, the sales would occur on the day the quiet period ends, which is when the underwriters' analysts typically initiate coverage, almost always with "buy" ratings. Thus, tainted analyst recommendations, which unsuspecting individual investors paid attention to, allow an exit at an inflated price.

Laddering would contribute to a negative correlation between first-day returns and long- run returns because the extra buying pressure on the first day from these purchase orders would create subsequent selling pressure when these shares were sold. Unless the market price is unaffected by buying and selling pressure, there will be price impacts. The evidence of stock price effects for analyst initiations at the end of the quiet period (Bradley et al., 2003 and Ofek and Richardson, 2003), and for selling pressure at the end of the lockup period (Bradley, Jordan, Roten, and Yi, 2001; Brav and Gompers, 2003; and Field and Hanka, 2001) suggests that such effects are present for IPOs.

VII. Conclusions

Why has underpricing changed over time? We explore three non-mutually exclusive explanations: changing risk composition, a realignment of incentives, and a changing issuer objective function.

A small part of the increase in underpricing can be attributed to the changing risk composition of the universe of firms going public. The physical riskiness of firms going public, as measured, for example, by age or assets, did not change very much between the 1980s and the 1990s, although the bubble period saw a high proportion of very young firms go public, and the post-bubble period saw a high proportion of older firms.

The realignment of incentives hypothesis argues that managerial incentives to reduce underpricing have decreased over time because of, among other reasons, reduced CEO ownership and a higher fraction of IPOs with no secondary shares. When we look at the whole sample period, however, there are only weak cross-sectional relations between underpricing and both the fraction of the firm sold and a dummy variable for a pure primary offering.

Furthermore, CEO ownership, as measured by the dollar value of holdings at the offer price, was twice as high during the bubble period as during the 1996-1998 period. This measure of CEO incentives suggests that underpricing should have *decreased* during the bubble period.

The changing issuer objective function hypothesis posits two reasons for why issuers became more complacent about underpricing in the 1990s and internet bubble period. First, the analyst lust hypothesis states that analyst coverage became a more important factor for issuers choosing a lead underwriter, due to higher valuations than in the 1980s. Since underwriters do not charge explicit fees for providing analyst coverage, issuers pay through the indirect cost of underpricing. Second, the spinning hypothesis argues that venture capitalists and the executives of issuing firms were co-opted through the allocation of hot IPOs to their personal brokerage accounts. This gave these decision-makers an incentive to choose a lead underwriter with a reputation for leaving money on the table in IPOs. Although the excessive dilution that results from underpricing their own IPO lowers their wealth, they gain on personal account when other hot IPOs are allocated to them. Since the profits from these other IPOs are imperfectly correlated with their undiversified paper wealth in their own company, the decision-makers are willing to accept excessive underpricing when their own firm goes public.

Multiple regressions with underpricing as the dependent variable yield evidence that supports the changing issuer objective function hypothesis.

Specifically, top-tier underwriters are associated with more underpricing in the 1990s, and especially in the bubble period. This is the result in both OLS and two-stage procedures that control for the endogenous choice of the lead underwriter. This is consistent with issuers choosing top-tier underwriters who have both influential analysts and, until spinning was prohibited, many other hot IPOs to allocate to important decision-makers. Furthermore, there is strong corroborating evidence in recent academic studies examining the relation between *Institutional Investor* all-star analysts and both IPO underpricing and changes in underwriter market share, and in regulatory settlements regarding spinning. We know of no evidence that is inconsistent with the testable implications of the spinning and analyst lust hypotheses.

We also document patterns in the US IPO market. The universe of companies going public in the US has changed over time. For example, we document that there has been a pronounced shift towards technology stocks and firms with negative earnings. How firms are brought public has changed over time, too. The market share of the prestigious national underwriters has increased, and regional investment banking firms are increasingly shut out of lead underwriter positions.

The reasons that IPOs are underpriced vary, depending on the environment. In the 1980s, it is conceivable that the winner's curse problem and dynamic information acquisition were the main explanations for underpricing that averaged 7% in the US. During the internet bubble, we think that these were not the main reasons for underpricing.

Instead, analyst coverage and side payments to CEOs and venture capitalists became of significant importance.

Appendix A. Founding Dates

The founding date is generally defined as the date of incorporation. We try to find the date of original incorporation, rather than a later date if the firm has reincorporated in Delaware or changed its name. Founding dates for 1980-1984 generally come from inspection of the prospectus. For 1985-1995, most of the founding dates were provided by Laura Field. For 1985-1987, Moody's is the main source of data. For 1988-1992, the prospectus is the main source. For 1993-1995, Disclosure and S&P Corporate Descriptions are the main sources. For 1993, some of the founding dates have come from Renaissance Capital. For 1996-2003, founding dates come from a variety of sources: Securities Data Co., Moody's, Dun & Bradstreet's *Million Dollar Directory*, and inspection of the prospectuses on Edgar, and were collected primarily by Laura Field (Field and Karpoff, 2002) and Li-Anne Woo. Some founding dates for 1999-2003 are from Thomson Financial's *The IPO Reporter*, an industry newsletter. According to Laura Field, for 1988-1992, founding dates are earlier than the date of the most recent incorporation for 48% of the firms. An example of this is from the April 2000 prospectus of Krispy Kreme doughnuts. The firm going public was incorporated in 1999, but the predecessor corporation was incorporated in 1982. Elsewhere in the prospectus one finds the statement that their first doughnut shop was opened in 1937. We use 1937 as the founding date.

For 1996-2000, we have used some of the founding dates that Alexander Ljungqvist and William Wilhelm have tabulated for their paper (Ljungqvist and Wilhelm, 2003). They inspected prospectuses and made judgments on many spinoffs.

Firms with inflation-adjusted (2003 purchasing power) sales in the last 12 months prior to going public of $200 million or more and younger than 2 years are frequently "reverse LBOs" or divisional spinoffs. For spinoffs, the founding date of the division is used, when possible. This may be the founding date of the parent corporation. For example, Lucent Technologies (a 1996 IPO) is the former Bell Labs division of AT&T. Its founding date is given as the founding date of Bell Labs. In general, "roll-ups" are given a founding date corresponding to the founding date of the parent firm (frequently a year before the IPO).

Age is defined as the calendar year of offering minus the calendar year of founding. Thus, a 2-year old firm may be anywhere from 13 months old to 35 months old.

Because some years (1980-1984, 1988-1993, and 2000-2003) have founding dates that are primarily from the prospectus, rather than dates of incorporation from Moody's, etc., some of the variation over time may be due to different data sources.

Appendix B. Post-Issue Shares Outstanding and Dual-class Shares

Of the 6,391 IPOs in our sample, 433 have multiple classes of shares outstanding after the IPO. Most of these are firms whose IPO is composed of

Class A shares. Class B shares with superior voting rights are owned by pre-issue shareholders, and are not publicly traded. These firms present a problem for computing the market capitalization. CRSP reports shares outstanding only for share classes that are publicly traded on Nasdaq, the Amex, or the NYSE. Thus, using the CRSP-reported shares outstanding to compute the market capitalization captures only part of the market value. To take an extreme example, the United Parcel Services IPO of November 9, 1999 issued 109 million shares of Class A stock, but over 1 billion shares of Class B stock also existed. Using only the Class A shares outstanding would underestimate the market value by 91%. The December 9, 1998 IPO of Infinity Broadcasting is another example. 140 million Class A shares were issued. CRSP reports this as the number of shares outstanding. But there were also 700 million Class B shares outstanding, giving a market cap six times as high for all the shares. In all our calculations of market capitalization, we assume that non-traded shares have the same price per share as the publicly traded class.

Thomson Financial Securities Data has many errors in reporting the number of post-issue shares outstanding, although the firm attempts to capture all classes. For single-class IPOs, CRSP is much more reliable. For dual-class IPOs, Thomson Financial is more reliable. Ljungqvist and Wilhelm (2003), in their analysis of IPOs from 1996-2000, also report substantial error rates in Thomson Financial's data on, e.g., post-issue shares outstanding, EPS, venture capital backing, and founding dates.

If we use just the CRSP-reported shares outstanding, the median market cap figure that we calculate is 4% lower than the Table I, Panel B numbers reported. The mean market cap using CRSP data is 17% lower than the numbers reported in Table I, Panel A.

Scott Smart and Chad Zutter supplied us with a list of 258 dual-class IPOs for 1990-1998, along with the post-issue shares outstanding. CRSP does not identify all the IPOs that involve dual-class shares that Smart and Zutter (2003) identify. The post-issue shares outstanding number that Smart and Zutter have recorded is the same as the Thomson Financial number only a little over 50% of the time. For discrepancies where we could check the prospectus using EDGAR (beginning in 1996), we found that Smart and Zutter were correct over 90% of the time. For dual-class IPOs where we could not verify the number, we use the Smart and Zutter number as the first choice and the maximum of the Thomson Financial and the CRSP number as the second choice. We use Dealogic's number if we cannot inspect the prospectus on EDGAR.

Appendix C. Underwriter Rank for IPOs over 1992-2003

For underwriter prestige rankings, we start with the Carter and Manaster (1990) and Carter et al. (1998) rankings. When a firm goes public, the underwriting section of the prospectus lists all the investment banking firms that are part of the underwriting syndicate, along with the number of shares that each underwrites. Lead underwriters are listed first, followed by co-managing underwriters, and then other syndicate members.

More prestigious underwriters are listed first in the non-managing underwriting section, in brackets, with underwriters in higher brackets underwriting more shares. If an underwriter always appears in the highest bracket among non-managing underwriters, it is assigned the top ranking of 9 on a 0-9 scale.

For underwriters in the 1992-2003 period, we assign a ranking as follows. The May 1999 Goldman Sachs prospectus lists over 120 underwriters, with numerous brackets. Managing and co-managing underwriters are assigned a ranking of 9; other underwriters are given a ranking based on their bracket, with a few minor adjustments. Other underwriters not included in the Goldman Sachs prospectus are assigned a ranking of 1 or 2 if they were penny stock underwriters that had been subject to enforcement actions by the SEC during 1995-1999 (the information on enforcement actions was provided by the Chicago office of the SEC's Division of Enforcement).

The numerical reputation ranking of remaining underwriters was determined by Bruce Foerster of South Beach Capital in Miami. Foerster has been an investment banker for close to 30 years, participating in the underwriting of 150 IPOs and hundreds of other transactions while a managing director at A.G. Becker Paribas, Paine Webber, Lehman Brothers, and South Beach Capital. He is also the editor of the Securities Industry Association's *Capital Markets Handbook* (Foerster, 2004), and has an encyclopedic knowledge of the investment banking industry during the last few decades. For the handful of other underwriters that Bruce Foerster was not familiar with and that were not identified in our other procedures, we assign a rank based on the offer price of IPOs that they underwrote, with penny stock underwriters earning the lowest ranks.

We made several alterations to the Carter and Manaster rankings for 1980-1984 and the Carter, Dark, and Singh rankings for 1985-1991. Carter, Dark, and Singh assign Hambrecht & Quist a 9.0, which we lower to 8.1. Carter and Manaster assign a rank of 2.0 to D.H. Blair in the 1980-1984 period, and Carter, Dark, and Singh assign it a rank of 8.0 to D.H. Blair during 1985- 1991. We assign a 4.1 to D.H. Blair for all years. A potential flaw in the Carter and Manaster methodology is that a penny stock underwriter that is never allowed into a syndicate of reputable underwriters might never be in a low bracket. Our judgment methodology avoids this problem. Note that we make very few changes in rankings.

All of the rankings we assign are integers followed by a 0.1 (1.1 up to 9.1). We attach a 0.1 to all our rankings so that other researchers can easily distinguish between our rankings and those from Carter and Manaster and Carter, Dark, and Singh, which never end with a 0.1. To use our rankings in empirical work, we recommend using "if then" commands to covert the x.1 rankings to x.0.

Appendix D. Internet and Technology Firms

To identify IPOs that are internet-related at the time of their offer, we merge the internet identifications of Thomson Financial Securities Data, Dealogic, and IPOMonitor.com. In 1998, Securities Data classified only 18 IPOs as internet stocks, omitting such firms as uBID, Ticketmaster

Online/Citysearch, NetGravity, and Verio. IPOMonitor.com classified 27 IPOs from 1998 as internet stocks, but omitted Cdnow and Interactive Magic, among others. Since these sources generally did not backdate the identification of early internet companies, we assign a "1" value to America On-Line, Spyglass, and Netscape.

The classifications have some inherent arbitrariness. For example, Storage Area Network (SAN) companies and telecommunications companies are not internet stocks; nor are such IPOs as VA Linux and Perot Systems.

SDC identifies two IPOs from the 1980s as internet firms: IPC Communications, a manufacturer of telecommunications equipment, and McClatchey Newspapers, which offered on-line services.

Tech stocks are defined as those in SIC codes 3571, 3572, 3575, 3577, 3578 (computer hardware), 3661, 3663, 3669 (communications equipment), 3671, 3672, 3674, 3675, 3677, 3678, 3679 (electronics), 3812 (navigation equipment), 3823, 3825, 3826, 3827, 3829 (measuring and controlling devices), 3841, 3845 (medical instruments), 4812, 4813 (telephone equipment), 4899 (communications services), and 7371, 7372, 7373, 7374, 7375, 7378, and 7379 (software).

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

SECURITIES AND
EXCHANGE COMMISSION,
Northeast Regional Office
233 Broadway
New York, New York 10279,

Plaintiff,

No. CV ( )

-against-

CREDIT SUISSE FIRST BOSTON
CORPORATION,

Defendant.

COMPLAINT

Plaintiff Securities and Exchange Commission (the "Commission") alleges the following against Credit Suisse First Boston Corporation ("CSFB"):

SUMMARY

CSFB SHARED PROFITS FROM HOT INITIAL PUBLIC OFFERINGS ("IPOS")

1. In exchange for shares in "hot" IPOs, CSFB wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock. From at least April 1999 through June 2000, CSFB employees allocated shares of IPOs to over 100 customers who were willing to funnel between 33 and 65 percent of their profits to CSFB. The profits were channeled to

CSFB in the form of excessive brokerage commissions generated by the customers in unrelated securities trades that the customers generally effected solely to satisfy CSFB's demands for a share of the IPO profits.

2. The more than 100 customers involved in the conduct alleged in this Complaint were primarily small "hedge funds," private equity funds, and wealthy individuals (the "Customers"). The profit-sharing activity was pervasive in such Customer accounts serviced by CSFB's Institutional Sales Trading Desk, Private Client Services (PCS) Group and Technology PCS Group ("Tech PCS"). The Customers were a small segment of the more than 2400 accounts to which CSFB allocated IPO stock as lead managing underwriter during the relevant time; in no IPO were such Customers allocated more than 10 percent of the IPO stock. Nonetheless, IPO trading was so profitable during this period that the Customers funneled tens of millions of dollars in profits to CSFB through improper commission payments.

NATURE OF THE PROCEEDINGS AND THE RELIEF SOUGHT

3. The Commission brings this action pursuant to authority conferred upon it by Sections 21(d) and 21(f) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78u(e) and 78u(f), to enjoin CSFB from violating provisions of the federal securities laws and the Conduct Rules of the National Association of Securities Dealers, Inc. ("NASD"). In addition, the Commission seeks other relief, including, but not limited to, disgorgement

and civil penalties, and certain ancillary and further relief as is necessary and appropriate.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this action pursuant to Sections 21(e) and 27 of the Exchange Act, 15 U.S.C. §§ 78u(e) and 78aa.

5. Venue lies in this Court pursuant to Section 27 of the Exchange Act, 15 U.S.C. § 78aa.

STATUTES AND RULES ALLEGED TO HAVE BEEN VIOLATED

6. CSFB has engaged in, and unless enjoined, will continue to engage, directly or indirectly, in transactions, acts, practices, and courses of business that constitute violations of Rules 2110 and 2330 of the NASD Rules of Conduct, and Section 17(a) of the Exchange Act, 15 U.S.C. § 78q(a), and Rule 17a-3(a)(6) thereunder, 17 C.F.R. § 240.17a-3(a)(6).

DEFENDANT

7. Credit Suisse First Boston Corporation is a broker-dealer registered with the Commission pursuant to Section 15 of the Exchange Act, 15 U.S.C. § 78o. CSFB's principal offices are located at 11 Madison Avenue, New York, New York 10010. CSFB provides the full range of services offered by a multi-purpose investment bank, including securities underwriting, sales and trading, and investment banking. CSFB has 15 branch offices in the United States. The majority of the conduct described herein occurred in the New York, Boston, and San Francisco offices.

FACTS

The Initial Public Offering Process at CSFB

8. An IPO is the first public issuance of stock from a company that has not previously been publicly traded. A "hot" IPO is one in which the stock immediately trades at a premium in the aftermarket.

9. During the period of 1999 through 2000, three business units within CSFB had primary responsibility for IPOs: the Global Investment Banking Division ("IBD"), the Equities Division, and the Global Equity Capital Markets Department ("ECM").

10. IBD typically assumed overall responsibility for an IPO from the initial engagement through the registration, marketing and pricing of the securities offered.

11. ECM was responsible for executing the distribution of an issuer's securities, including overseeing the allocation of an issuer's shares. ECM included the Syndicate Desk, which made allocation decisions for institutional accounts.

12. The Equity Sales Department provided brokerage services to CSFB's customers, including access to CSFB-led offerings. CSFB's equity sales force included research sales people who provided CSFB's research to institutional accounts and marketed IPOs to them; institutional sales traders, who serviced institutional accounts; PCS representatives, who serviced middle market accounts; and Tech PCS representatives, who serviced middle market clients of CSFB's technology group, among other clients.

CSFB's Allocation Process

13. During the relevant time period, apart from the conduct alleged in this Complaint, CSFB regularly relied on the following criteria, among others, to make allocation decisions in IPOs: the level of business an account had done with the firm, the long or short term interest of an account in an issuer, the size of an account's anticipated long term investment, an account's track record of investment in similar issues, an account's apparent interest in the issuer as evidenced by attendance at roadshows, the account's assets under management, and the existing or potential business relationship between an account and CSFB.

14. CSFB accounts that received IPO allocations fell into two categories: institutional accounts and retail accounts. Institutional accounts ran the gamut from large mutual funds to small hedge funds and private equity funds. During the relevant time period, middle market accounts serviced by the PCS and Tech PCS group were considered retail accounts. These accounts were comprised primarily of small institutions, private equity funds, and high net worth individuals.

15. In CSFB lead-managed IPOs, more than 70% of the shares offered were typically allocated to institutional accounts from the so-called "institutional pot." During the relevant time period, the Syndicate Desk was responsible for allocating shares to institutional accounts. Institutional sales traders and research sales persons relayed information regarding their accounts' indications of interest in a particular IPO to the Syndicate Desk.

16. The PCS and Tech PCS groups were allotted specific percentages of offerings to distribute to covered accounts pursuant to understandings reached between and among ECM, PCS and Tech PCS. In PCS, managers then gave account representatives blocks of stock to allocate among their clients. Tech PCS employees allocated their shares to individual trading accounts and discretionary accounts managed by the Tech PCS group. PCS typically received 5% or less of the offering to allocate and distribute; Tech PCS typically received 3% or less to allocate and distribute.

CSFB's Profit-Sharing Practices

17. Among the reasons that investors sought to obtain IPO stock during the relevant period was the large profit to be earned by "flipping" the shares if the IPO was successful. That is, some investors hoped to realize quick profits by selling the shares in the immediate aftermarket if the IPO traded at a premium to its offering price.

18. During 1999 and 2000, CSFB capitalized on the unprecedented growth in the new issue market and in the demand for shares in IPOs by using the IPO product to gain additional profits from certain of its smaller, less powerful Customers.

19. Employees of CSFB's ECM, PCS, and Tech PCS divisions informed Customers, both implicitly and explicitly, that they were expected to pay a portion of profits earned on their IPO flipping to CSFB in order to continue to receive allocations in "hot" IPOs.

20. Customers that refused to funnel a portion of their profits to CSFB received smaller allocations, and in some instances were denied allocations altogether. Most Customers, however, paid CSFB willingly, because of the huge profits to be made by flipping their allocations.

21. To maximize commission payments to CSFB, the Customers paid excessive commissions on off-setting trades in large capitalization, highly liquid, exchange-listed securities otherwise unrelated to the IPOs. CSFB employees sometimes assisted certain of the Customers in effecting these off-setting trades.

22. The sole purpose of this trading activity was to generate commissions for CSFB. Customers frequently executed one side of the trade with CSFB (e.g., a purchase at a commission as high as $3.15 per share) and then virtually simultaneously executed the off-setting side of the trade through another broker-dealer (e.g., a sale of the same quantity of the same stock) at the standard commission of $.06 per share.

23. On a number of occasions, both sides of the off-setting trades were executed at CSFB.

24. Although the off-setting purchases and sales were executed at similar prices, payment of significant commissions frequently resulted in net losses to the Customers. Because the trades were executed close in time, however, the transactions were not subject to significant market risk.

25. In order to eliminate any market risks associated with a change in price, some of the Customers often executed off-setting trades utilizing market-on-open or market-on-close trades. In some

instances, CSFB employees suggested securities in which the Customers could execute such market-on-open or market-on-close orders.

CSFB Kept Close Watch on Customer Profits

26. CSFB generated documents designed to keep track of the profits such Customers would have earned by selling their allocations at specific times. For example, CSFB generated a document entitled the New Issue Performance Report, which measured the hypothetical profits a Customer would have generated on all CSFB products at various intervals after their purchase, as well as the commissions the Customer had paid to CSFB.

27. Certain institutional sales traders and research sales persons used information contained in the New Issue Performance Report to urge Customers to increase their payments to CSFB in exchange for IPO allocations. In some instances, CSFB personnel told Customers that they should maintain a 3:1 ratio of IPO profit to secondary business.

28. The Tech PCS group generated numerous spreadsheets showing the assumed profits Customers would have earned by selling their IPO allocations on the first day of trading, and comparing the assumed profits to secondary commissions paid to CSFB. The spreadsheets also calculated the percentage of profits earned versus secondary commissions paid to CSFB on a year-to-date basis.

CSFB Managers and Employees Actively Participated In Profit-Sharing Practices

29. Each of the CSFB business units that participated in the IPO allocation process engaged in

explicit and implicit policies and practices to obtain improper payments from Customers in exchange for allocations in hot IPOs. Participation in this conduct extended to senior levels of these business units and was widespread within the relevant business units.

30. Senior executives in managerial and supervisory roles:

- knew of the practices described in this Complaint:
- encouraged many of the practices described in this Complaint;
- directed CSFB employees to urge Customers to maintain specified ratios of commissions to IPO profits; and
- in some instances, personally engaged in some of the practices described in this Complaint.

31. The practices described in this Complaint were not isolated occurrences. Rather, these practices were a fundamental part of the manner in which CSFB dealt with a small but significant portion of its customer base. The prevalence of these practices is reflected in numerous e-mail messages and other communications, such as those set forth below.

32. On November 10, 1999 the head of one business unit told the head of another business unit "we should feed [Customers] they are paying us 35% on deal day."

33. One of these business unit heads characterized allocations as "free money" for the Customers. Employees in this business unit were

given information from the New Issue Performance Report and advised when ratios of IPO profit to secondary business for certain Customers were too high. Employees were directed to tell Customers with high ratios that they needed to increase their business to bring the ratio down.

34. This business unit head told one of his employees that market-on-open orders were used by certain Customers to generate commissions to obtain IPO allocations. He said that market-on-open orders allow Customers to minimize risk while increasing the commissions paid to CSFB.

35. A senior manager described one Customer as being on "the 4 to 1 plan which is generous. This should be really easy and painless. ... [Customer] simply needs to be told what we have made him vs. what he has paid us. ...." In a subsequent e-mail, another senior manager asked "what did he pay us in Jan secondary and how much did he make."

36. CSFB sales traders told Customers that they were expected to pay for IPO stock. For example, one sales trader told a Customer "okay we got another screaming deal and I weasled you guys some stock we've yet to see any leverage out of your guys for the free dough-re-me does it make sense for me ... to continue to feed your guys with deal stock or should I take the stock to someone who will pay us direct for the allocation."

37. In at least one instance, a CSFB employee directed the flipping activity in a Customer's account in order to ensure that the Customer paid an appropriate amount of its profits to CSFB. The Customer had complained to the employee that he was receiving small IPO allocations. The employee

told the Customer that the Customer was not paying back a sufficient amount of profits to CSFB. The employee stated that CSFB expected Customers to pay one-third of their profits back in commissions in return for allocations. Because the Customer believed CSFB was overestimating his profits, he directed the employee to sell the IPO shares for him and retain one-third of the profits in commissions. The employee agreed. Thereafter, the employee sold the Customer's IPO shares. The employee and Customer engaged in telephone conversations at the end of the trading day to finalize the commissions to be placed on trades to reach the one-third level.

38. The Customer subsequently stopped receiving IPO allocations. Upon asking the employee the reason, the Customer was told that he was required to return fifty percent of his trading profits to receive allocations. The Customer refused and did not receive any further allocations.

39. In another business unit, a senior manager asked customers to place \$.50 per share commissions or "put 2%" on trades when Customers had done well in an IPO. The same senior manager regularly called his best Customer to suggest large capitalization, liquid securities for the Customer to trade in order to generate commissions to pay to CSFB.

40. In another instance, an employee in this business unit told a Customer to return from vacation to generate sufficient profits to pay to CSFB in order to receive allocations in upcoming IPOs. The same employee often called the same customer in advance of hot IPOs and said he wanted 50% of

the Customer's profit in order to receive IPO allocations in those particular deals.

41. In another business unit, Customers were specifically told that they were expected to pay back fifty percent of their profits to CSFB in order to receive IPO allocations.

42. Employees in this business unit called their Customers on at least a monthly basis and told them that CSFB expected them to pay fifty percent of their IPO profits to CSFB. This business unit aggressively enforced the fifty percent requirement, which was later increased to sixty-five percent. Customers that refused to increase their payments to CSFB were cut off from IPO allocations.

43. For example, on February 10, 2000 a CSFB sales trader in this business unit informed a senior salesman in the unit that the sales trader had spoken to a Customer and "told him that he was very far behind on his commissions and that we expect a 65% return on all money that we make him. I said that he still owes us for the LNUX deal not to mention the deals that have come since then. I then stated that he can do trades to increase his commissions but he will be further cut off from any syndicate in the future." The senior salesman responded "out." The sales trader responded "done."

44. Because of the profits to be made by flipping IPO shares, certain Customers created false corporate identities and often misrepresented the amount of their assets under management and the source of their wealth in order to appear to be larger, institutional accounts, worthy of receiving IPO allocations. CSFB failed to conduct due diligence regarding these Customers to verify that the

information supplied on Customers' account opening forms, such as the Customer's identity and amount of assets under management, was accurate.

45. Some CSFB employees were aware of practices described in paragraph 44. For example, an employee in the PCS group told one of his Customers to open a second account using a new corporate identity. The Customer already received allocations through the Institutional Sales Group but opened a second account in order to receive allocations from the PCS group.

The Payments to CSFB Were Significant

46. Customers generally paid commissions of five to six cents per share for transactions executed at CSFB. In order to funnel IPO profits to CSFB, the Customers placed a wide range of excessive commissions on certain trades, frequently paying 10, 20 or even 30 times a normal commission rate. The Customers also paid excessive markups and markdowns on transactions in over-the-counter securities.

47. For example, in July 1999, CSFB served as the lead underwriter for several "hot" IPOs including Gadzoox Networks ("Gadzoox") and MP3.com ("MP3").

48. Gadzoox opened on July 20, 1999 and closed at a price of $74.8125, over 256 percent above its IPO price of $21. CSFB, as lead managing underwriter, distributed approximately 3.4 million shares of the 4.025 million Gadzoox shares offered. Of the 3.4 million Gadzoox shares distributed by CSFB, at least 261,025 shares were allocated to Customers that

were willing to funnel a portion of their IPO profits to CSFB.

49. MP3 opened on July 21, 1999 and closed at a price of $63.3125, over 126 percent above its IPO price of $28. CSFB distributed 7.2 million of the 10.35 million MP3 shares offered through underwriters. Of the 7.2 million MP3 shares distributed by CSFB, at least 520,170 shares were allocated to Customers that were willing to funnel a portion of their IPO trading profits to CSFB.

50. In order funnel profits to CSFB, the Customers that had received allocations of shares in these two IPOs engaged in large transactions in highly liquid large capitalization securities at excessive commission rates. For example, over the three-day period of July 19, 1999 through July 21, 1999, one of the PCS Customers that had received a 4,000 share allocation of Gadzoox and a 10,000 share allocation of MP3 from CSFB paid CSFB at least $425,700 by making the following trades:

Date	Commission Per Share	Security	Number of Shares
7/19/99	$1.00	Coca Cola	25,000
7/20/99	$1.00	Coca Cola	69,700
7/21/99	$1.00	Coca Cola	31,000
7/21/99	$1.00	Conoco	250,000
7/21/99	$ 1.00	Allstate	25,000
7/21/99	$ 1.00	Philip Morris	25,000

51. Similarly, on July 19, 1999 a Tech PCS Customer that had received a 2,500 share allocation of Gadzoox and a 5,500 share allocation of MP3 from CSFB paid at least $124,000 to CSFB by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
7/19/99	$ .50	AT&T	50,000
7/19/99	$ .50	IMC	10,000
7/20/99	$ .63	Philip Morris	40,000
7/20/99	$ .75	AT&T	20,000
7/21/99	$ .90	Compaq	60,000

52. Another PCS Customer that had received a 1,500 share allocation of Gadzoox and a 5,700 share allocation of MP3 from CSFB paid CSFB at least $183,750 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
7/20/99	$ .75	Compaq	15,000
7/20/99	$ .75	Disney	30,000
7/21/99	$ 1.00	Allstate	25,000
7/21/99	$1 .00	Wells Fargo	30,000
7/21/99	$ 1.00	Disney	30,000
7/21/99	$ 1.00	Philip Morris	20,000
7/21/99	$ 1.00	Pfizer	30,000
7/21/99	$ .50	K Mart	30,000

53. Another Tech PCS Customer that had received a 2,000 share allocation of Gadzoox and a 5,000 share allocation of MP3 from CSFB paid CSFB at least $187,875 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
7/20/99	$ .75	Chase Manhattan	5,000
7/20/99	$ .75	Genentech	4,000
7/20/99	$ .75	Cendant	26,000
7/20/99	$ .75	Compaq	9,000
7/20/99	$ .75	Hewlett Packard	6,000
7/20/99	$ .75	IBM	11,000
7/20/99	$ .75	Lucent	14,000
7/21/99	$ .75	Citigroup	84,500
7/21/99	$ .75	Tyco	4,000
7/21/99	$ .75	Disney	7,000
7/21/99	$ .75	MedPartners	21,000
7/21/99	$ .75	Pepsico	16,000

7/21/99	$ .75	AT&T	8,000
7/21/99	$ .75	Compaq	35,000

54. Some of the most dramatic instances of improper profit-sharing occurred in connection with the VA Linux Systems, Inc. ("Linux") IPO. CSFB, as lead underwriter, distributed approximately 4.1 million shares of the 5.060 million shares offered through underwriters. The Linux IPO was priced at $30 per share. The IPO opened on December 9, 1999 and closed at a price of $239.25 per share, an unprecedented increase of over 697 percent. In order to funnel IPO profits to CSFB, Customers that received at least 405,398 shares engaged in large transactions in highly liquid large capitalization securities at excessive commission rates.

55. The El Sitio IPO also opened on December 9, 1999 and closed at a price of 33.125, 108 percent above its offering price. As lead underwriter, CSFB distributed 7.5 million shares of the 9.43 million shares distributed by underwriters. CSFB distributed at least 627,378 shares to Customers willing to funnel a portion of their profits to CSFB.

56. For example, on December 9, 1999, an Institutional Customer that had received a 13,500 share allocation of Linux and a 20,000 share allocation of El Sitio from CSFB paid CSFB $1 million by placing a commission of $.50 per share on 2 million shares of Compaq.

57. A Tech PCS Customer that had received an 8,000 share allocation of Linux and a 30,000 share

allocation of El Sitio from CSFB paid CSFB at least $819,800 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
12/9/99	$ 2.00	EMC	50,000
12/9/99	$ 2.00	General Electric	85,000
12/9/99	$ 2.00	IBM	50,000
12/9/99	$ 1.50	Nokia	90,000
12/9/99	$ 1.00	Ford	50,000
12/9/99	$ 1.00	General Motors	20,000
12/9/99	$ 1.00	Home Depot	45,000
12/9/99	$ 1.00	Proctor & Gamble	40,000
12/10/99	$ .94	Sprint	45,000
12/10/99	$ .94	AT&T	45,000
12/10/99	$ .94	Time Warner	40,000
12/10/99	$ .94	Tyco	40,000

58. Another Institutional Customer that had received a 12,500 share allocation of Linux from

CSFB paid CSFB at least $565,000 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
12/9/99	$ 2.75	AT&T	50,000
12/9/99	$ 2.70	Citigroup	50,000
12/9/99	$ 1.25	Compaq	100,000
12/9/99	$ .50	K Mart	50,000
12/9/99	$ .80	Kroger Co.	100,000
12/10/99	$ .50	Kroger Co.	125,000

59. Another Institutional Customer that had received an 8,500 share allocation of Linux from CSFB paid CSFB at least $402,650 by engaging in the following transactions.

Date	Commission Per Share	Security	Number of Shares
12/9/99	$ .48	America Online	50,000
12/9/99	$ .19	K Mart	150,000
12/9/99	$ .48	Citigroup	200,000
12/9/99	$ .43	Disney	150,000
12/9/99	$ .22	Kroger	120,000
12/9/99	$ .48	National Semiconductor	20,000
12/9/99	$ .38	Tyco	150,000
12/10/99	$ .29	America Online	20,000
12/10/99	$ .29	Lucent	20,000
12/10/99	$ .29	Micron	10,000
12/10/99	$ .29	National Semiconductor	10,000
12/10/99	$ .29	Citigroup	100,000
12/10/99	$ .29	Disney	50,000
12/10/99	$ .29	Tyco	100,000
12/10/99	$ .15	K Mart	45,000

60. Another Institutional Customer that received a 12,500 share allocation of Linux and a 10,000 share allocation of El Sitio from CSFB paid CSFB $438,960 on December 9, 1999 and $295,600 on December 10. This Customer paid commissions as high as $3 per share and executed its off-setting trades at CSFB. On December 9, the Customer bought 38,000 shares of IBM at a price of 113 and paid a commission of $2.85 per share. On the same day, the Customers sold 36,000 shares of IBM at a price of 119.54 and paid a commission of $3 per share. On December 10, the Customer bought 25,000 shares of Time Warner at a price of 67.5 and paid a commission of $1.68 per share. On the same day, the Customer sold 25,000 shares of Time Warner at a price of $68 per share and paid a commission of $1.68 per share.

61. CSFB also shared in the profits of its Customers in connection with the two IPOs that opened on March 9, 2000, Selectica and OTG Software ("OTG").

62. The Selectica IPO closed at a price of $141.23, over 370 percent above its offering price of $30. CSFB, as lead managing underwriter, distributed approximately 3.9 million shares of the 4.6 million Selectica shares offered. Customers who were willing to pay a portion of their profits to CSFB received at least 324,903 shares in the Selectica IPO.

63. The OTG IPO closed at $56.18, over 195 percent above its offering price of $19. As lead underwriter, CSFB distributed approximately 4.9 million of the 5.75 million OTG shares offered. Customers who were willing to pay a portion of their profits to CSFB received at least 471,312 shares in the OTG IPO.

64. An Institutional Customer that had received a 5,000 share allocation of Selectica and a 10,000 share allocation of OTG paid CSFB at least $278,600 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
3/10/00	$ .38	American Home Products	65,000
3/10/00	$ .38	America Online	70,000
3/10/00	$ .38	Citigroup	80,000
3/10/00	$ .38	Pfizer	200,000
3/10/00	$ .38	AT&T	125,000
3/10/00	$ .38	Tyco	60,000
3/10/00	$ .38	US West	80,000
3/10/00	$ .38	Charles Schwab	10,000
3/10/00	$ .29	Xerox	50,000
3/10/00	$ .19	Edison	10,000

65. Another Institutional Customer that had received a 5,000 share allocation of Selectica and a 10,000 share allocation of OTG from CSFB paid

CSFB $178,000 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
3/10/00	$ .60	Lucent	70,000
3/10/00	$ .60	Pfizer	50,000
3/10/00	$ .60	AT&T	80,000
3/10/00	$ .40	Compaq	100,000
3/10/00	$ .18	Mattel	100,000

66. A Tech PCS Customer that had received a 7,000 share allocation of Selectica and a 15,000 share allocation of OTG from CSFB paid CSFB at least $166,000 by engaging in the following transactions:

Date	Commission Per Share	Security	Number of Shares
3/10/00	$ .75	IBM	50,000
3/10/00	$ .75	Qwest	50,000
3/10/00	$ .75	US West	50,000
3/10/00	$ .60	Ford	10,000
3/10/00	$ .60	Federal National Mortgage Association	50,000
3/10/00	$ .35	Philip Morris	50,000

67. The payments described in paragraphs 46 through 66 are representative examples of CSFB's practices during the relevant period.

68. CSFB recorded the payments described in paragraphs 46 through 66 as commissions when, in fact, the payments were made as profit-sharing in exchange for IPO allocations.

69. The Commission understands that, simultaneously with the filing of this Complaint, CSFB is entering into a Letter of Acceptance, Waiver and Consent ("AWC") with NASD Regulation, Inc. ("NASD Regulation") arising from the same matters alleged herein. In addition to the remedies imposed in the AWC, the relief sought by the Commission pursuant to this Complaint is necessary and appropriate in the public interest and for the

protection of investors, within the meaning of Section 21(f)(2) of the Exchange Act.

FIRST CLAIM FOR RELIEF
CSFB VIOLATED RULE 2110 OF THE CONDUCT RULES OF THE NASD

70. Paragraphs 1 through 69 are realleged and incorporated herein by reference.

71. NASD Conduct Rule 2110 requires members to observe high standards of commercial honor and just and equitable principles of trade.

72. CSFB violated Rule 2110 by engaging in the conduct described in paragraphs 1 through 69 above.

SECOND CLAIM FOR RELIEF
CSFB VIOLATED RULE 2330 OF THE NASD RULES OF PRACTICE

73. Paragraphs 1 through 69 are realleged and incorporated herein by reference.

74. NASD Conduct Rule 2330(f) prohibits a member or any person associated with a member from sharing directly or indirectly in the profits or losses of a customer, unless certain conditions not applicable here are met.

75. As described in paragraphs 1 through 69, from at least April 1999 through June 2000, CSFB shared directly or indirectly in the profits or losses in accounts of customers carried by CSFB, in violation of Rule 2330(f).

THIRD CLAIM FOR RELIEF
CSFB VIOLATED SECTION 17(a) OF THE EXCHANGE ACT, 15 U.S.C. § 78q(a) AND RULE 17a-3(a)(6) THEREUNDER

76. Paragraphs 1 through 69 are realleged and incorporated herein by reference.

77. As alleged above, commencing in or about April 1999, CSFB, while it was, among other things, a broker and dealer transacting a business in securities through the medium of members of national securities exchanges and a broker and dealer registered with the Commission pursuant to Section 15 of the Exchange Act, 15 U.S.C. § 78o, failed to accurately make and keep for prescribed periods such records, furnish such copies thereof and make, disseminate and file such reports as the Commission by rule, has prescribed as necessary and appropriate in the public interest and for the protection of investors.

78. Rule 17a-3, 17 C.F.R § 240.17a-3(a)(6), requires a broker-dealer to maintain a record of each order received for the purchase and sale of a security that includes the terms and conditions, including, but not limited to, the commission, mark-up, or mark-down associated with such order.

79. As described above, CSFB failed to reflect accurately the terms and conditions of its orders because it failed to record that the commissions, markups and markdowns paid by certain Customers were profit-sharing in exchange for IPO allocations.

80. By reason of the foregoing, CSFB directly and indirectly violated, and unless enjoined will again violate, Section 17(a) of the Exchange Act, 15 U.S.C.

§ 78q(a), and Rule 17a-3(a)(6) thereunder, 17 C.F.R. § 240.17a-3(a)(6).

RELIEF SOUGHT

WHEREFORE, plaintiff Commission respectfully requests that this Court enter judgment:

1. permanently restraining and enjoining CSFB, directly or indirectly, from violating Rules 2110 and 2330 of the NASD Conduct Rules and Section 17(a) Exchange Act, 15 U.S.C. § 78q and Rule 17a-3, 17 C.F.R § 240.17a-3 thereunder;

2. directing CSFB to disgorge the ill-gotten gains obtained from its conduct, plus prejudgment interest thereon;

3. requiring CSFB to pay a civil penalty pursuant to Section 21(d) of the Exchange Act, 15 U.S.C. § 78u(d);

4. issue an order requiring CSFB to institute policies and procedures to prevent the violations described herein from occurring in the future and retain an independent consultant to audit CSFB's allocation procedures;

5. granting such other and further relief as the Court may deem just and proper; and

6. retaining jurisdiction of this action in order to implement and carry out the terms of any Orders which may be entered herein.

Respectfully submitted,

WAYNE M. CARLIN (WC 2114)
Attorney for Plaintiff
SECURITIES AND EXCHANGE COMMISSION

Dated: January 22, 2002

Northeast Regional Office
233 Broadway
New York, New York 10279
(646) 428-1510

Of Counsel:

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Turn Around Series: Jerry Rawls, Finisar (Part 1)

Thursday, March 8, 2007

I recently had the opportunity to talk with Jerry Rawls, the CEO and co-founder of Finisar, about his experiences during the past two decades. While technology companies are accustomed to volatile market places and constant change, Jerry guided Finisar through arguably the most volatile market environment in history.

In this interview he takes us through the strong days of the late 90's with a peak market cap of nearly $5 billion, through the dotcom bubble burst where typical companies in the same market segment saw sales drop by 98% in under a year, to today where Finisar has been established as a strong global company and a leader in optical components.

SM: Where I would like to begin the interview is to ask you a bit about your background to set the conversation in context before you started Finisar. Take us back to where you come from, where you grew up, about your family, did you have entrepreneurial roots?
JR: I am a Texan. I was born in Houston and I grew up in Texas. I went to the University of Texas Tech. I can't trace entrepreneurial roots back very far other than that when I was a kid I always had jobs, I had a newspaper route when I was 10 and I always had jobs doing something, but I don't remember starting much of anything.

I was in a junior achievement organization where we actually made soap and sold it to supermarkets for a year and that was fun, we did that for a year. I went to college and studied mechanical engineering. Texas Tech was great experience for me, I enjoyed the social and educational parts of it, and I also had some great summer jobs. I worked for IBM, Shell Oil, and US Steel during the summers.

I learned in that process that I did not want to be a design engineer, and though I was majoring in mechanical engineering it seemed the kinds of activities I would enjoy were more involved with people. I had been a bit of a student politician, a student body officer and a member of the student senate. I was a fraternity officer. I was a member of a lot of organizations, and, I don't know, somehow maybe that steered me along that way.

So I decided that what I wanted to do was go to business school as opposed to more education in engineering or moving into a job as a mechanical engineer somewhere. I went to business school at Purdue.

I chose Purdue because at the time the Vietnam War was running hot and heavy, and Linden Johnson had just abolished what used to be known as the II-S (two s) scholastic deferment for education from the draft, but he had grandfathered everybody that was in school, and essentially what it said was you have four years to complete your degree, and after that you are subject to the draft, which at the end meant you were subject to going to Vietnam.

Anyway, it was a very quantitative MBA; everybody in the program was either an engineer or a scientist.

One of the companies that had interviewed at the school the year I finished was Raychem. I ended up joining Raychem and I actually moved to Menlo Park for a few months as part of a technical training program because the job I had accepted was a sales engineer and my first job was going to be Chicago.

So, I went of to Chicago to be a sales engineer, and I did well at it and my customers grew and I sold a lot of Raychem materials. Then I moved to Dallas and became a Sales Manager, and then I moved to California and became a Marketing Manager. I progressed through the marketing management roles and became national sales manager and head of product marketing for our division, and eventually the division manager of a couple divisions of the company.

Turn Around Series: Jerry Rawls, Finisar (Part 6)

A very interesting discussion of the dramatic times during the late 90's and the early 2000 timeframe. Read on.

SM: What were your sales pre-IPO? JR: I think in the '98 period they were probably $30M. Our fiscal year 2000, which is when we went public, was $67M. In January of 1999 the IPO market came back.

We did a take-off with all of the bankers and selected Merrill Lynch to be our lead, and we scheduled and started working towards an IPO in October. It was a really successful IPO, we went public at $19, the stock traded as high as $106 on the opening day, and closed at $89. We were the seventh largest increase on the first day of trading in the history of all the US stock exchanges. Our market cap was well over a billion dollars. I think our peak market cap in those days was as much as $5B.

SM: Are you talking about a $67M revenue with a $5B market cap? JR: Yeah, it was pretty unbelievable. Our sales in that fiscal year were $67M, and then our sales in the next fiscal year were $188M. So, we grew a lot in that year, but the world was booming still.

SM: And then it collapsed. JR: The whole market collapsed in 2000, 2001 and all of a sudden it was a whole new brand of reality. In early 2001, it was an unbelievable time, our sales were growing 30% a quarter. We could not find buildings to rent in Sunnyvale, we could not hire engineers fast enough, and our suppliers could not keep up with us.

Then the collapse happened, our peak quarter was $65M in sales, that was Q3 '01, which is the quarter which ended in January 01. In two quarters our sales dropped 47%, and that sounds horrible, but in the same period Nortel's optic division sales dropped 98%, and Lucent's optic division dropped more than 98%, and in the end Nortel literally gave their optical division away.

SM: Did you have an option to buy that? JR: We did, but we decided that the amount of money it would take ... remember this is an organization that had 1,400 people, and at its peak it had well over 2,000 almost 3,000 people and it had $1.4B in sales in its peak quarter.

Remember the crazy thing is Corning, in '99, had offered Nortel $100B in cash to buy this division. They turned it down because they thought it was not enough money. Now, in two quarters, their sales dropped from $1.4B to $23M. It was a crash that nobody could manage their way out of, all you could do was try to unload it, get rid of the division and make somebody else deal with it. Nortel came to us and had chose Finisar as being in a complementary industry, and said that they would like to have us manage this division and have us be a supplier to them, because they knew they had all of these sole source products designed into Nortel systems which were built in this division.

Filed Pursuant to Rule 424(b)(4)
Registration Statement No. 333-87017

PROSPECTUS

8,150,000 SHARES

[FINISAR LOGO]

COMMON STOCK

This is Finisar Corporation's initial public offering.

Prior to the offering, no public market existed for the shares. The common stock has been approved for listing on the Nasdaq National Market under the symbol "FNSR."

INVESTING IN THE COMMON STOCK INVOLVES RISKS THAT ARE DESCRIBED IN THE "RISK FACTORS" SECTION BEGINNING ON PAGE 5 OF THIS PROSPECTUS.

	PER SHARE	TOTAL
Public offering price	$ [illegible]	$ [illegible]
Underwriting discount	[illegible]	[illegible]
Proceeds, before expenses, to Finisar Corporation	$ [illegible]	$ [illegible]

The underwriters may also purchase up to an additional 1,155,000 shares from Finisar and several of our stockholders at the public offering price, less the underwriting discount, within 30 days from the date of this prospectus to cover over-allotments. We will not receive any of the proceeds from any shares that may be sold by the selling stockholders.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

The shares will be ready for delivery on or about November 17, 1999.

MERRILL LYNCH & CO.

J.P. MORGAN & CO.
DAIN RAUSCHER WESSELS
MORGAN KEEGAN & COMPANY, INC.
SOUNDVIEW TECHNOLOGY GROUP

The date of this prospectus is November 11, 1999.

* * *

local currency. Doing so will subject us to fluctuations in exchange rates between the U.S. dollar and the particular local currency.

DELAWARE LAW AND OUR CHARTER DOCUMENTS CONTAIN PROVISIONS THAT COULD DISCOURAGE OR PREVENT A POTENTIAL TAKEOVER, EVEN IF SUCH A TRANSACTION WOULD BE BENEFICIAL TO OUR STOCKHOLDERS

Some provisions of our Certificate of Incorporation and Bylaws, as well as provisions of Delaware law, may discourage, delay or prevent a merger or acquisition that a stockholder may consider favorable. These provisions include:

- authorizing the board to issue additional preferred stock;

- prohibiting cumulative voting in the election of directors;

- limiting the persons who may call special meetings of stockholders;

- prohibiting stockholder actions by written consent;

- creating a classified Board of Directors pursuant to which our directors are elected for staggered three-year terms; and

- establishing advance notice requirements for nominations for election to the board of directors or for proposing matters that can be acted on by stockholders at stockholder meetings.

For a more detailed discussion of such anti-takeover provisions, see "Description of Capital Stock."

OUR MANAGEMENT WILL HAVE BROAD DISCRETION OVER THE USE OF PROCEEDS FROM THIS OFFERING AND MAY NOT OBTAIN A SIGNIFICANT RETURN ON THE USE OF THESE PROCEEDS

Net proceeds of this offering are not allocated for a specific purpose. Our management will have broad discretion in determining how to spend the net proceeds from this offering and may spend the proceeds in a manner that our stockholders may not deem desirable. We cannot assure you that our investments and use of the net proceeds of this offering will yield favorable returns or results.

OUR HEADQUARTERS AND CONTRACT MANUFACTURERS ARE ALL LOCATED IN NORTHERN CALIFORNIA WHERE NATURAL DISASTERS MAY OCCUR

Currently, our corporate headquarters and contract manufacturers are located in Northern California. Northern California historically has been vulnerable to natural disasters and other risks, such as earthquakes, fires and floods, which at times have disrupted the local economy and posed physical risks to our and our manufacturers' property. We presently do not have redundant, multiple site capacity in the event of a natural disaster. In the event of such disaster, our business would suffer.

SUBSTANTIAL NUMBERS OF SHARES OF OUR COMMON STOCK WILL BECOME AVAILABLE FOR SALE IN THE PUBLIC MARKET SIMULTANEOUSLY, WHICH COULD CAUSE THE MARKET PRICE OF OUR STOCK TO DECLINE

Sales of substantial amounts of our common stock in the public market following this offering, or the appearance that a large number of shares is available for sale, could cause the market price of our common stock to decline. The number of shares of common stock available for sale in the public market will be limited by lock-up agreements under which the holders of substantially all of our outstanding shares of common stock, including 450,000 shares proposed to be sold pursuant to this offering, and options and warrants to purchase common stock will agree not to sell or otherwise dispose of any of their shares for a period of 180 days after the date of this prospectus without the prior written consent of Merrill Lynch, Pierce, Fenner & Smith Incorporated. Upon the expiration of these lock-up agreements and assuming the full exercise of all vested options to purchase common 15 stock outstanding on October 15, 1999, approximately 40,257,829 shares of common stock will become eligible for sale simultaneously. Moreover, Merrill Lynch may, in its sole discretion and at any time without notice, release all or any portion of the securities subject to lock-up agreements. In addition to the adverse effect a price decline could have on holders of common stock, that decline would likely impede our ability to raise capital through the issuance of additional shares of common stock or other equity securities.

See "Shares Eligible for Future Sale" and "Underwriting."

YOU WILL EXPERIENCE IMMEDIATE AND SUBSTANTIAL DILUTION IN THE NET TANGIBLE BOOK VALUE OF THE STOCK YOU PURCHASE

The initial public offering price of our common stock will be substantially higher than the pro forma net tangible book value per share of the outstanding common stock immediately after the offering. Therefore, based on an initial public offering price of $19.00 per share, if you purchase our common stock in this offering you will suffer immediate dilution of approximately $16.05 per share. If additional shares are sold by the underwriters following exercise of their over-allotment option, or if outstanding options or warrants for our common stock are exercised, there will be further dilution. See "Dilution."

OUR STOCK PRICE MAY BE VOLATILE AND YOU MAY BE UNABLE TO RESELL YOUR SHARES AT OR ABOVE THE OFFERING PRICE

There previously has not been a public market for our common stock. We cannot predict the extent to which investor interest in us will lead to the development of a trading market or how liquid that market might become. The initial public offering price for our common stock was determined by negotiations between us and the representatives of the underwriters and may not be indicative of prices that will prevail in the trading market. For a discussion of the factors to be considered in determining the initial public offering price, see "Underwriting."

In addition, the stock market in general, and the Nasdaq National Market and stocks of technology companies in particular, have experienced extreme price and volume fluctuations. This volatility is often unrelated or disproportionate to the operating performance of these companies. Broad market and industry factors may adversely affect the market price of our common stock, regardless of our actual operating performance. In the past, following periods of volatility in the market price of a company's securities, securities class-action litigation has often been initiated against these companies. This litigation, if initiated, could result in substantial costs and a diversion of management's attention and resources, which would significantly harm our business.

* * *

PRINCIPAL AND SELLING STOCKHOLDERS

The following table sets forth information known to us regarding the beneficial ownership of our common stock as of September 30, 1999, and as adjusted to reflect the sale of the common stock offered hereby, by:

- each stockholder who is known by us to beneficially own more than 5% of common stock;
- each of our executive officers listed on the Summary Compensation Table under Management;"
- each of our directors; and
- all of our executive officers and directors as a group.

[illegible]	[illegible]	[illegible]	
		[illegible]	[illegible]
[illegible]			
[illegible]	[illegible]	[illegible]	[illegible]
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[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	*	*
[illegible]	[illegible]	[illegible]	[illegible]
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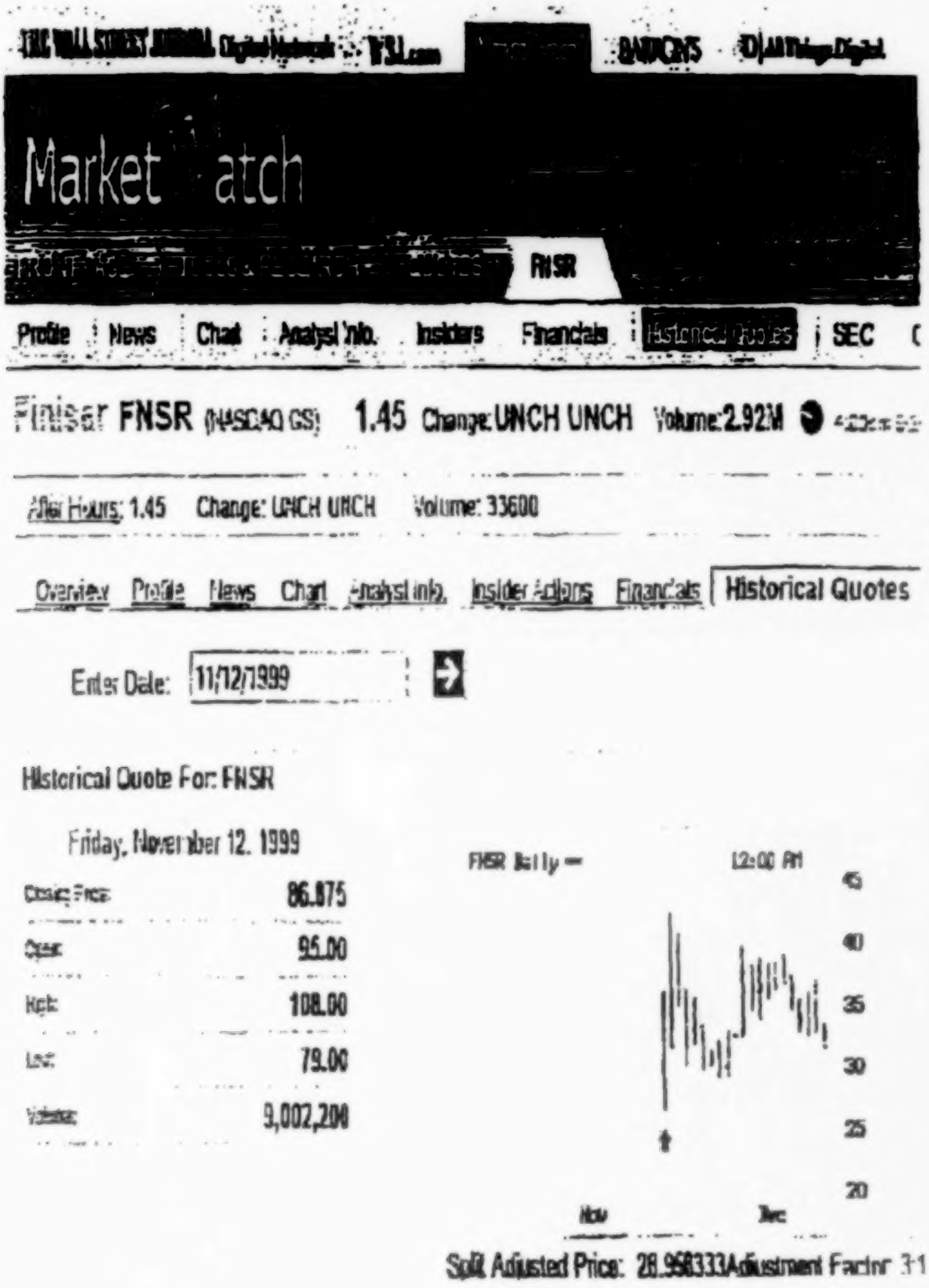
[illegible]	--	*	*
[illegible]	--	*	*
[illegible]	[illegible]	[illegible]	[illegible]

* Less than 1%.

(1) Beneficial ownership is determined in accordance with the rules of the SEC and generally includes voting or investment power with respect to securities. All shares of common stock subject to options exercisable within 60 days following September 30, 1999 are deemed to be outstanding and beneficially owned by the person holding those options for the purpose of computing the number of shares beneficially owned and the percentage of ownership of that person. They are not, however, deemed to be outstanding and beneficially owned for the purpose of computing the percentage ownership of any other person. Accordingly, percent ownership is based on: (i) before the offering, 42,007,462 shares of Common Stock outstanding as of September 30, 1999 plus any shares issuable pursuant to options held by the person or group in question which may be exercised within 60 days of September 30, 1999; and (ii) after the offering, an additional 8,150,000 shares to be issued by the Company in the offering. Except as indicated in the other footnotes to the table and subject to applicable community property laws, based on information provided by the persons named in the table, these persons have sole voting and investment power with respect to all shares of the common stock shown as beneficially owned by them.

(2) Assumes no exercise of the underwriters' over-allotment option. If the underwriters exercise their over-allotment option in full, entities affiliated with TA Associates, Inc. will sell 699,767 shares and will beneficially own 6,329,621 shares, or 12.5% of the outstanding common stock, after completion of this offering.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FNSR Daily
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Nov
Dec

Finisar FNSR (NASDAQ GS) 1.45 Change: UNCH UNCH Volume: 2.92M

After Hours: 1.45 Change: UNCH UNCH Volume: 33600

Enter Date: 11/12/1999

Historical Quote For: FNSR

Friday, November 12, 1999

Closing Price:	86.875
Open:	95.00
High:	108.00
Low:	79.00
Volume:	9,002,200

Split Adjusted Price: 28.958333 Adjustment Factor: 3:1

Yahoo! Finance

Tuesday, September 2, 2008, 5:23PM ET – U.S. Markets Closed.

Finisar Corp. **(FNSR)** **At 4:00PM ET: 1.45 0.00 (0.00%)**

Upgrades & Downgrades History

Date	Research Firm	Action	From	To
13-Jun-08	Piper Jaffray	[illegible]	Buy	Neutral
22-Feb-08	Morgan Keegan	Initiated		Outperform
9-Nov-07	Jefferies & Co	[illegible]	Buy	Hold
5-Sep-07	Needham & Co	[illegible]	Strong Buy	Buy
8-Aug-07	Merriman Curhan Ford	[illegible]	Neutral	Buy
4-May-07	Merriman Curhan Ford	[illegible]	Buy	Neutral
27-Sep-06	Citigroup	Initiated		Buy
6-Sep-06	Miller Johnson	[illegible]	Outperform	Market Perform
7-Jul-06	Deutsche Securities	Initiated		Buy
26-Jun-06	Merriman Curhan Ford	Initiated		Buy
2-Jun-06	Miller Johnson	Initiated		Outperform
14-Mar-06	CIBC Wrld Mkts	Initiated		Sector Outperform
6-Mar-06	Jefferies & Co	Initiated		Buy
3-Mar-06	Needham & Co	[illegible]	Buy	Strong Buy
3-Mar-06	Sanders Morris Harris	[illegible]	Hold	Buy
2-Sep-05	Needham & Co	[illegible]	Hold	Buy
20-May-04	Sanders Morris Harris	Initiated		Hold

20-Feb-04	Banc of America Sec	Initiated		Neutral
20-Jan-04	AmTech Research	[illegible]	Buy	Hold
15-Oct-03	AmTech Research	Initiated		Buy
16-Oct-02	AG Edwards	[illegible]	Buy	Hold
27-Aug-02	CIBC Wrld Mkts	[illegible]	Sector Outperformer	Sector Performer
22-Jul-02	Morgan Stanley	Initiated		Equal-weight
7-Jun-02	CSFB	[illegible]	Buy	Hold
7-Jun-02	Merrill Lynch	[illegible]	LT Strong Buy	LT Neutral
20-May-02	JP Morgan	[illegible]	LT Buy	Mkt Perform
17-May-02	RBC Capital Mkts	[illegible]	Outperform	Sector Perform
19-Apr-02	AG Edwards	[illegible]	Hold	Strong Buy
11-Jan-02	Needham & Co	[illegible]	Hold	Buy
4-Jan-02	CSFB	[illegible]	Hold	Buy
28-Nov-01	Needham & Co	Initiated		Hold
20-Nov-01	Thomas Weisel	Initiated		Mkt Perform
25-Oct-01	Robertson Stephens	Initiated		Mkt Perform
4-Oct-01	CE Unterberg Towbin	[illegible]	Buy	Strong Buy
28-Aug-01	UBS Warburg	Initiated		Hold
27-Jul-01	FAC/Eqts First Albany	[illegible]	Strong Buy	Neutral
27-Jul-01	Merrill Lynch	[illegible]	NT Accum	NT Neutral
19-Jul-01	AG Edwards	[illegible]	Accumulate	Maintain Position
13-Jul-01	CSFB	Initiated		Hold
1-May-01	FAC/Eqts First Albany	[illegible]	Buy	Strong Buy
21-Feb-01	AG Edwards	[illegible]	Buy	Accumulate

21-Feb-01	Epoch Partners	[illegible]	New	ActionCall Neg
19-Jan-01	CE Unterberg Towbin	Initiated		Buy
23-Nov-00	AG Edwards	[illegible]	Accumulate	Buy
22-Nov-00	AG Edwards	[illegible]	Accumulate	Buy
18-Apr-00	CIBCWrld Mkts	Initiated		Buy
14-Apr-00	Wit SoundView	[illegible]	Buy	Strong Buy
7-Feb-00	AG Edwards	Initiated		Accumulate
7-Dec-99	Merrill Lynch	Initiated		NT Accum/LT Buy
7-Dec-99	JP Morgan	Initiated		Buy
7-Dec-99	Dain Rauscher Wessels	Initiated		Strong Buy
7-Dec-99	SoundView Tech	Initiated		Buy

Yahoo! Finance

Tuesday, September 2, 2008, 5:27PM ET – U.S. Markets Closed.

Finisar Corp. (FNSR) **At 4:00PM ET: 1.45 0.00 (0.00%)**

PRICES

Date	Open	High	Low	Close	Volume	Adj Close*
31-Dec-99	90.75	91.50	88.62	89.87	171,900	29.96
30-Dec-99	93.94	95.00	90.50	91.25	257,700	30.42
29-Dec-99	100.19	103.00	93.00	93.25	430,500	31.08
28-Dec-99	88.50	97.50	84.31	96.50	531,300	32.17
27-Dec-99	86.12	89.44	82.12	87.88	340,500	29.29
23-Dec-99	79.37	87.75	74.50	86.62	923,400	28.88
22-Dec-99	83.87	84.12	78.62	80.25	388,200	26.75
21-Dec-99	84.88	87.00	83.38	84.00	454,200	28.00
20-Dec-99	85.06	86.50	80.13	84.88	714,600	28.29
17-Dec-99	89.00	92.00	85.00	85.12	296,700	28.37
16-Dec-99	88.00	91.19	86.50	88.25	453,000	29.42
14-Dec-99	93.00	99.00	92.31	93.81	371,700	31.27
13-Dec-99	94.12	95.12	90.00	94.00	538,500	31.33
10-Dec-99	100.00	100.25	93.50	95.12	435,900	31.71
9-Dec-99	109.25	110.94	98.00	99.87	584,700	33.29
8-Dec-99	101.63	108.13	97.00	107.94	726,300	35.98
7-Dec-99	104.00	105.88	97.88	101.19	1,159,200	33.73
6-Dec-99	111.00	111.75	103.25	108.38	655,200	36.13
3-Dec-99	112.56	117.13	109.50	110.25	624,300	36.75
2-Dec-99	110.87	114.50	108.50	110.50	248,700	36.83
1-Dec-99	110.00	114.50	106.00	111.12	614,400	37.04

PROSPECTUS Filed Pursuant to Rule 424(b)(4)
Registration No. 333-32620

7,700,000 SHARES
[FINISAR LOGO]
COMMON STOCK

Finisar Corporation is selling 2,000,000 shares
and Finisar Corporation
stockholders are selling 5,700,000 shares.

The shares are quoted on the Nasdaq National Market under the symbol "FNSR." On April 6, 2000 the last sale price of the shares as reported on the Nasdaq National Market was $100 7/16.

INVESTING IN THE COMMON STOCK INVOLVES RISKS THAT ARE DESCRIBED IN THE "RISK FACTORS" SECTION BEGINNING ON PAGE 5 OF THIS PROSPECTUS.

	PER SHARE	TOTAL
Public offering price	$100.00	$770,000,000
Underwriting discount	$3.90	$30,030,000
Proceeds, before expenses, to Finisar Corporation	$96.10	$192,200,000
Proceeds to the selling stockholders	$96.10	$547,770,000

The underwriters may also purchase up to an additional 578,726 shares from us and 576,274 shares from some of the selling stockholders at the public offering price, less the underwriting discount, within 30 days from the date of this prospectus to cover over-allotments.

Neither the Securities and Exchange Commission nor any state securities commission has approved or disapproved of these securities or determined if this prospectus is truthful or complete. Any representation to the contrary is a criminal offense.

The shares will be ready for delivery on or about April 12, 2000.

MERRILL LYNCH & CO.

J.P. MORGAN & CO.

CIBC WORLD MARKETS

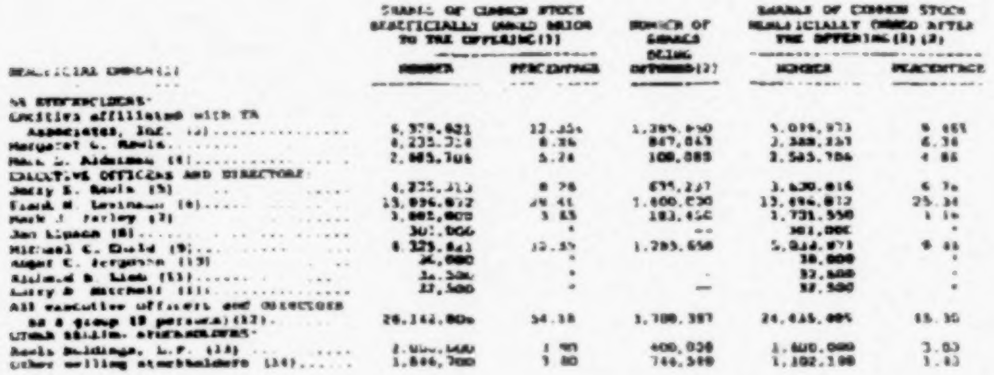
DAIN RAUSCHER WESSELS
A.G. EDWARDS & SONS, INC.
MORGAN KEEGAN & COMPANY, INC.
WIT SOUNDVIEW
AMERITRADE

The date of this prospectus is April 7, 2000.

PRINCIPAL AND SELLING STOCKHOLDERS

The following table sets forth information known to us regarding the beneficial ownership of our common stock as of January 31, 2000, and as adjusted to reflect the sale of the common stock offered hereby, by:

- each stockholder who is known by us to beneficially own more than 5% of common stock;
- each of our executive officers listed on the Summary Compensation Table under "Management;"
- each of our directors;
- all of our executive officers and directors as a group; and
- each selling stockholder.



BENEFICIAL OWNER(1)	SHARES OF COMMON STOCK BENEFICIALLY OWNED PRIOR TO THE OFFERING(1)		NUMBER OF SHARES BEING OFFERED(2)	SHARES OF COMMON STOCK BENEFICIALLY OWNED AFTER THE OFFERING(1)(2)	
	NUMBER	PERCENTAGE		NUMBER	PERCENTAGE
5% STOCKHOLDERS:					
Entities affiliated with TA Associates, Inc. (2)	6,379,621	12.35%	1,285,650	5,093,971	9.46%
Margaret C. Rawls	4,235,324	8.36	847,063	3,388,261	6.30
[illegible] L. Aldeman (4)	2,685,706	5.28	100,000	2,585,706	4.80
EXECUTIVE OFFICERS AND DIRECTORS:					
Jerry S. Rawls (5)	4,235,313	8.36	615,297	3,620,016	6.74
Frank H. Levinson (6)	13,896,872	28.41	1,000,000	12,896,872	25.34
Mark J. Farley (7)	1,915,000	3.83	183,450	1,731,550	3.16
Jan Lipson (8)	301,066	*	--	301,066	*
Michael C. Child (9)	6,379,621	12.35	1,285,650	5,093,971	9.46
Roger C. Ferguson (10)	38,000	*		38,000	*
Richard B. Lieb (11)	32,500	*	-	32,500	*
Larry D. Mitchell (11)	37,500	*	—	37,500	*
All executive officers and directors as a group (8 persons)(12)	26,142,806	54.18	3,100,387	24,045,405	45.30
OTHER SELLING STOCKHOLDERS:					
Rawls Holdings, L.P. (13)	2,000,000	3.95	400,000	1,600,000	3.03
Other selling stockholders (14)	1,846,700	3.80	744,500	1,102,200	2.13

* Less than 1%.

(1) Unless otherwise indicated, the address of each of the named individuals is:

c/o Finisar Corporation, 1308 Moffett Park Drive, Sunnyvale, CA 94089. Beneficial ownership is determined in accordance with the rules of the SEC and generally includes voting or investment power with respect to securities. All shares of common stock subject to options exercisable within 60 days following January 31, 2000 are deemed to be outstanding and beneficially owned by the person holding those options for the purpose of computing the number of shares beneficially owned and the percentage of ownership of that person. They are not, however, deemed to be outstanding and beneficially owned for the purpose of computing the percentage ownership of any other person. Accordingly, percent ownership is based on: (i) before the offering, 51,253,428 shares of Common Stock outstanding as of January 31, 2000 plus any shares issuable pursuant to options held by the person or group in question which may be exercised within 60 days following January 31, 2000; and (ii) after the offering, an additional 2,000,000 shares to be issued by the Company in the offering Except as indicated in the other footnotes to the table and subject to applicable community property laws, based on information provided by the persons named in the table, these persons have sole voting and investment power with respect to all shares of the common stock shown as beneficially owned by them.

(2) Assumes no exercise of the underwriters' over-allotment option. If the underwriters exercise their over-allotment option in full, entities affiliated with TA Associates, Inc. will sell 576,274 additional shares and will beneficially own 4,463,697 shares, or 7.6% of the outstanding common stock, after completion of this offering.

(3) Includes 1,529,186 shares held by Advent Atlantic and Pacific III L.P., 4,587,556 shares held

by TA/Advent VIII, L.P., 95,014 shares held by TA Investors LLC and 117,865 shares held by TA Executives Fund LLC. TA/Advent VIII L.P., Advent Atlantic & Pacific III L.P., TA Executives Fund LLC and TA Investors LLC are part of an affiliated group of investment partnerships. The general partner of TA/Advent VIII L.P. is TA Associates VIII LLC. The general partner of Advent Atlantic and Pacific III L.P. is TA Associates AAP III Partners L.P. TA Associates, Inc. is the general partner of TA Associates AAP III Partner L.P. and is the sole manager of TA Advent VIII LLC, TA Executives Fund LLC and TA Investors LLC. In such capacity, TA Associates, Inc., through an executive committee, exercises sole voting and investment power with respect to all shares held of record by the named investment partnerships; individually, no stockholder, director or officer of TA Associates, Inc., is deemed to have or share such voting or investment power. The address of TA Associates, Inc. is 125 High Street, High Street Tower, Suite 2500, Boston, MA 02110.

(4) Includes 2,633,206 shares held by Mr. Alderman in his capacity as sole trustee for the following trusts: 1,143,206 shares held by the Frank & Wynnette Levinson Irrevocable Trust, (25,000 of which are being offered hereby), 500,000 shares held by the Alana Marie Levinson 1998 Gift Trust, (25,000 of which are being offered hereby), 500,000 shares held by the Frank Henry Levinson 1998 Gift Trust, (25,000 of which are being offered hereby), 500,000 shares held by the Rose Wynnette Levinson 1998 Gift Trust (25,000 of which are being offered hereby), 10,000 shares held by the Carl Alan Levinson Trust and 10,000 shares held by the Paul

Norman Levinson Trust. Mr. Alderman disclaims beneficial ownership of all shares which he holds as sole trustee of the foregoing trusts. Mr. Alderman's address is c/o Wolf, Block, Schorr and Solis-Cohen LLP, 1650 Arch Street, 22nd Floor, Philadelphia, PA 19103.

(5) Represents shares held by the Rawls Family, L.P. Mr. Rawls is the president of the Rawls Management Corporation, the general partner of the Rawls Family, L.P.

(6) Includes 12,346,872 shares held by the Frank H. & Wynnette Levinson 1998 Revocable Trust, (250,000 of which are being offered hereby), 1,250,000 held by Seti Trading Co., Inc., an investment company owned by Frank and Wynnette Levinson (all of which are being offered hereby), 500,000 shares held by the Rose Wynnette Levinson 1998 Gift Trust, (25,000 of which are being offered hereby), 500,000 shares held by the Alana Marie Levinson 1998 Gift Trust (25,000 of which are being offered hereby) and 500,000 shares held by the Frank Henry Levinson 1998 Gift Trust (25,000 of which are being offered hereby).

(7) Includes 661,540 shares issuable upon exercise of options exercisable within 60 days following January 31, 2000, 923,460 shares held by the Farley Family Trust and 300,000 shares held by an irrevocable trust for the benefit of Mr. Farley's child.

(8) Includes 240,000 shares subject to a right of repurchase in favor of Finisar which lapses over time.

(9) Mr. Child disclaims beneficial ownership of all shares held by affiliates of TA Associates, Inc. of

which Mr. Child is a Managing Director, except to the extent of 14,454 shares of common stock in which he has an ownership interest through TA Investors LLC.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

Form 8-K

CURRENT REPORT

PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

Date of report (date of earliest event reported):

August 28, 2008

Finisar Corporation

(Exact name of registrant as specified in its charter)

Delaware	000-27999	94-3038428
(State of other jurisdiction of incorporation)	(Commission File No.)	(I.R.S. Employer Identification No.)

1389 Moffett Park Drive
Sunnyvale, CA 94089
(Address of principal executive offices)

Registrant's telephone number, including area code:
(408) 548–1000

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions (see General Instruction A.2. below):

☐ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

☐ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

☐ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

☐ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c))

Item 2.01 Completion of Acquisition or Disposition of Assets.

As previously reported on a From 8-K report filed by Finisar Corporation ("Finisar") on May 16, 2008, Finisar, Fig Combination Corporation, a wholly-owned subsidiary of Finisar ("Merger Sub"), and Optium Corporation ("Optium") entered into an Agreement and Plan of Merger dated as of May 15, 2008 (the "Merger Agreement"). Copies of the Merger Agreement and forms of Voting Agreements referred to therein were filed as exhibits to such Form 8-K report and are incorporated herein by reference. At a special meeting of the stockholders of Optium, held on August 28, 2008, Optium's stockholders approved and adopted the Merger Agreement, and at the annual meeting of the stockholders of Finisar, also held on August 28, 2008, Finisar's stockholders approved the issuance of shares of Finisar common stock pursuant to the Merger Agreement.

On August 29, 2008, pursuant to the Merger Agreement, Merger Sub was merged with and into Optium (the "Merger"). Pursuant to the terms of the Merger Agreement, each outstanding share of Optium common stock was converted into the right to receive 6.262 shares of Finisar common stock, for total merger consideration of approximately 161 million shares of Finisar common stock. Also under the terms of the Merger Agreement, each outstanding option and warrant to purchase shares of Optium common stock and each Optium restricted stock unit outstanding as of the effective time of the Merger was assumed by Finisar and became exercisable for a number of shares of Finisar common stock. The number of shares of Finisar common stock issuable upon the exercise of each assumed Optium option, warrant or restricted stock unit is determined by multiplying the exchange ratio, 6.262, by the number of shares of Optium common stock underlying the option, warrant or restricted stock unit, as the case may be, rounded down to the nearest whole number. The per share exercise price of each assumed Optium option or warrant is determined by dividing the aggregate exercise price of the Optium option or warrant by the number of shares of Finisar common stock purchasable under such option or warrant, as calculated above. With the close of the transaction, Optium which traded under the symbol "OPTM", ceased to be listed on the NASDAQ Global Market.

Finisar prepared and filed with the Securities and Exchange Commission (the "Commission") a registration statement on Form S-4 (Registration No. 333–152231) which became effective on July 23, 2008, with respect to shares of Finisar common stock issued in the Merger (the "Form" S-4). In addition, Finisar intends to register with the Commission on Form S-8 the shares of Finisar common stock issuable upon exercise of the assumed Optium options, warrants and restricted stock units.

A copy of a press release announcing the effectiveness of the Merger is attached as Exhibit 99.1 and is incorporated herein by reference.

Item 5.02 Departure of Directors or Certain Officers; Election of Directors; Appointment of Certain Officers; Compensatory Arrangements of Certain Officers.

Pursuant to the terms of the Merger Agreement, Eitan Gertel, Optium's Chairman and Chief Executive Officer, became Finisar's Chief Executive Officer upon consummation of the Merger on August 29, 2008. Mr. Gertel, age 46, served as Optium's President and as a director from March 2001 to August 29, 2008, and as Chief Executive Officer and Chairman of the Board from February 2004 to August 29, 2008. Mr. Gertel was employed as Vice President and General Manager of the former transmission systems division of JDS Uniphase, a provider of broadband test and management solutions and optical products, from 1995 to 2001. There are no transactions between Mr. Gertel and Finisar requiring disclosure pursuant to Item 404(a) of Regulation S-K. A description of the material terms of Mr. Gertel's interest in the merger transaction, including acceleration of the vesting of options and restricted stock units held by Mr. Gertel, is set forth on pages 82 to 84 of the Form S-4, which are incorporated herein by reference. Mr. Gertel will initially receive the same compensation he received as Chairman and Chief Executive Officer of Optium, subject to a post-Merger review by the Compensation Committee of the Finisar board of directors of the cash and equity compensation of the executive officers of the combined company. Pursuant to the terms of an employment agreement between Optium and Mr. Gertel, which was assumed by Finisar pursuant to the Merger, if, within 12 months following the Merger, Mr. Gertel's employment is terminated involuntarily by Finisar (other than for cause) or voluntarily by Mr. Gertel in circumstances that constitute constructive termination, Finisar will be obligated to pay Mr. Gertel a lump sum payment equal to two times his current annual compensation. As an executive officer of Finisar, Mr. Gertel is also entitled to participate in Finisar's Executive Retention and Severance Plan, which is described on pages 203 and 204 of the Form S-4, which are incorporated herein by reference.

Also pursuant to the Merger Agreement, Jerry S. Rawls, formerly Finisar's Chairman of the Board, President and Chief Executive Officer, will continue to serve as executive Chairman of the Board, following the Merger. Mr. Rawl's compensation will be unchanged.

Under the Merger Agreement, Finisar agreed to increase the size of its board by two members, to a total of nine members, and to appoint three current members of the Optium board of directors to serve on the Finisar board. As previously reported, Frank H. Levinson, a member of the Finisar board, tendered his resignation to be effective immediately prior to the effectiveness of the Merger for the purpose of creating a third vacancy on the Finisar board. Accordingly, on August 29, 2008, Dr. Levinson's resignation from the Finisar board became effective. Also, effective on August 29, 2008, Morgan Jones, Christopher Crespi and Eitan Gertel were appointed as Class I, Class II and Class III members, respectively, of the Finisar board. In addition, Mr. Jones was appointed to serve on the Compensation Committee of Finisar's board, and Mr. Crespi was appointed to serve on the Audit Committee of Finisar's board. There are no transactions between either Mr. Jones or Mr. Crespi and Finisar requiring disclosure pursuant to Item 404(a) of Regulation S-K. A description of the material terms of the interests of Messrs. Jones and Crespi in the merger transaction is set forth on pages 82 to 84 of the Form S-4.

Following the consummation of the Merger, Finisar's board of directors consists of Christopher Crespi, Roger C. Ferguson, David C. Fries, Eitan Gertel, Morgan Jones, Frank H. Levinson, Larry D. Mitchell, Jerry S. Rawls and Robert N. Stephens.

Item 8.01 Other Events.

At the annual meeting of the stockholders of Finisar held on August 28, 2008, the following matters were considered and voted upon:

(a) The issuance of shares of Finisar common stock in connection with the Merger was approved, as more fully described in Item 2.01 of this report;

(b) Jerry S. Rawls and Dominique Trempont were elected as Class III directors to serve on Finisar's board of directors for a three-year term expiring at the 2011 annual meeting of stockholders and until their respective successors are duly elected and qualified; and

(c) The appointment of Ernst & Young LLP as Finisar's independent auditors for the fiscal year ending April 30, 2009 was ratified.

Item 9.01 Financial Statements and Exhibits.

(a) Financial Statements of Business Acquired

The Report of Ernst & Young LLP as Optium's independent registered public accounting firm is hereby incorporated by reference to Exhibit 99.2 hereto.

The audited consolidated balance sheets of Optium as July 28, 2007 and July 29, 2006 and the audited consolidated statements of operations, consolidated statements of changes in redeemable convertible preferred stock and stockholders' equity (deficit) and consolidated statements of cash flows of Optium for each of the three years in the period ended July 28, 2007, and the notes related thereto, are hereby incorporated by reference to Exhibit 99.2 hereto.

The unaudited condensed consolidated balance sheet of Optium as of May 3, 2008 and the unaudited condensed consolidated statements of operations and condensed consolidated statements of cash flows for the periods ended May 3, 2008 and April 28, 2007, and the notes related thereto, are hereby incorporated by reference to Exhibit 99.3 hereto.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS R. DREILING, on behalf of INFOSPACE, INC.	No. C01-1528P
Plaintiff,	**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
v.	
STILES A. KELLETT, JR., et al.	
Defendants,	
and	
INFOSPACE, INC.,	
Nominal Defendants.	

Defendants Stiles A. Kellett, Jr. and Kellett Partners (the "Kellett Defendants") move for summary judgment on Plaintiff's insider trading claim under Section 16(b) of the 1934 Securities and Exchange Act. (Dkt. No. 61.) Having reviewed the submissions of the parties, the Court concludes that Plaintiff raises a genuine issue of material fact regarding whether the Kellett Defendants were insiders under the "deputization" and "group" theories. If the Kellett Defendants are insiders who failed to disclose their trades, the statute of limitations for this action is tolled. Accordingly, Defendants' Motion for Summary Judgment is DENIED.

BACKGROUND

Mr. Kellett is a private investor who has invested millions of dollars in technology companies through Kellett Partners, of which he is the sole general partner. Mr. Kellett has also organized a corporate entity named Kellett Investment Corporation ("Kellett Investment"). Kellett Investment does due diligence, negotiates possible investments for Mr. Kellett and Kellett Partners, and generally manages the financial affairs of the Kellett family. (Cunningham Dep. at 48; Kellett Dep. at 14, 59.) Kellett Investments receives occasional payments from Kellett Partners, without which Kellett Investments could not meet its expenses. (Kellett Dep. at 90.) Mr. Kellett, not Kellett Investments, makes the ultimate decision whether Kellett Partners invests in a company.

John Cunningham is co-founder and President of Kellett Investments, and as such he works to find investment opportunities for Kellett Partners. Mr. Cunningham is not paid a salary. Rather, Kellett Partners loans to Mr. Cunningham a sum equal to 10% of Kellett Partners' investment in a company, which Mr. Cunningham then invests in the same company as Kellett Partners. If the investment makes money, Mr. Cunningham pays back the loan. If the investment loses money, Mr. Cunningham's loan is forgiven. Through this arrangement, Mr. Cunningham has been forgiven hundreds of thousands of dollars. (Kellett Dep. at 28).

Mr. Cunningham has been a director of InfoSpace since July 1998. (Amend. Comp. ¶ 5.) While Mr. Cunningham was a director, both he and Kellett Partners invested in InfoSpace. This a common practice for the Kellett Defendants. Mr. Cunningham was a director or advisor to the board in over ten companies in which the Kellett Defendants invested. (Cunningham Dep. at 54-59; Pl.'s Ex. CCC at 7.) In fact, Mr. Kellett is unaware of any company on whose board Mr. Cunningham sits in which Mr. Kellett is not invested. (Kellett Dep. at 52-53.) The parties do not dispute that a number of the Kellett Defendants' purchases and sales of InfoSpace stock would qualify as prohibited short-swing trades if the Kellett Defendants were considered insiders.

The parties strongly dispute whether Mr. Cunningham was on the InfoSpace board in his own capacity or as a representative of the Kellett Defendants' interests. Although the parties argue the inferences that can be drawn from the evidence, there is agreement on a number of key facts. At least six internal InfoSpace documents were passed from Mr. Cunningham to the Kellett Defendants or Kellett Investment employees. An email from Naveen Jain, InfoSpace's founder and CEO, was forwarded by Mr. Cunningham to the Kellett Defendants. (Pl.'s Ex. I.) This email described Mr. Jain's views on future plans and strategies for InfoSpace. (*Id.* at 3-4.) Forwarded with this email was a critical response by another InfoSpace director. (*Id.* at 2-3.) Mr. Cunningham gave to Kellett Investment employee Kathryn Drucker a copy of a non-public due diligence report by Morgan Stanley for a potential InfoSpace acquisition of

Go2Net. (Pl.'s Exs. O, P, Q.) Two documents turned over by Mr. Cunningham to Kellett Investment employees were internal InfoSpace emails detailing the goals and projects of the company. (Pl.'s Exs. R, S, T.) Finally, Mr. Cunningham copies to Mr. Kellett an InfoSpace "executive summary"—labeled "proprietary and confidential"—containing revenue and profit projections, indicating that the initial public offering would take place in late 1998. (Pl.'s Ex. W.)

Mr. Cunningham was also involved in advising the Kellett Defendants on their investments, including investment in InfoSpace. Although the parties dispute the extent of his involvement, Mr. Cunningham participated in creating or reviewing quarterly reports prepared for the Kellett Defendants on their InfoSpace investment. (Pl.'s Exs. X, Y, Z.) Mr. Cunningham and Mr. Kellett had "almost daily contact" through telephone calls and talked about InfoSpace in some of these calls. (Cunningham Dep. at 97-99.) Although Mr. Cunningham did not have the authority to actually make the Kellett Defendants' investment decisions, Mr. Kellett relied heavily on Mr. Cunningham's advice: "John [Cunningham] would do due diligence on a potential investment. I don't know exactly what he did in that due diligence. ... I did not require him to go into great detail particularly about an internet investment since I don't understand it." (Kellett Dep. at 32-33.) Mr. Kellett stated that he could not recall rejecting a single one of Mr. Cunningham's investment recommendations. (*Id.* at 36-38.) Before InfoSpace went public, Mr. Cunningham wrote to the underwriter of the IPO to allow Mr. Kellett, under the heading "director's list," to obtain a large number of pre-IPO shares, on which the Kellett Defendants eventually made nearly $2 million in profit. (Pl.'s Ex. XX at 1, K at 1-2.)

The parties also dispute whether the Kellett Defendants invested in InfoSpace as part of an agreement with Rufus Lumry, a private investor who operates through the venture capital fund "Acorn Ventures." Plaintiff marshals the following facts to suggest that there is an investment "group" composed of Mr. Lumry and the Kellett Defendants. It is undisputed that Mr. Lumry negotiated a large investment in InfoSpace with Mr. Jain. Mr. Lumry "wanted me [Jain] to enter a similar agreement with Kellett Partners." (Jain Dep. at 159). "Rufus said, I have some investors, and these are close friends, and they should have a similar deal." (*Id.*) Mr. Jain negotiated this deal for the Kellett Partners with Mr. Lumry, never talking with any representatives from Kellett Partners. (*Id.* at 162.) Mr. Lumry then invited Mr. Cunningham and Mr. Kellett to participate in this deal. (Kellett Dep. at 32, Lumry Dep. at 64.) In one document labeled "confidential" that considers a proposed investment in "Meals.com/Web2Store.com," Mr. Lumry's Acorn Ventures and Kellett Investments are labeled an "Acorn/Kellett Investor Group." (Pl.'s Ex. GGG at 1-2.) Both Kellett Partners and Acorn signed consulting agreements with InfoSpace, and Kellett Partners was to provide these consulting services "in cooperation and consultation with Acorn Ventures." (Pl.'s Ex. EEE at 2.) This was related to an "angel" investment philosophy, through which both Acorn and the Kellett Defendants would not simply invest money in a company for the sort term, but would work with the company to enhance its value. (Pl.'s

Exs. G at 1, CCC at 2.) Defendants claims that Mr. Lumry and Mr. Kellett were simply in communication as interested private investors who occasionally shared information and advice. Mr. Lumry denies that he was party to any agreement with the Kellett Defendants.

ANALYSIS

Section 16(b) of the 1934 Securities and Exchange Act contains a blanket prohibition on insiders engaging in short-swing trades—buying and selling (or vice versa) within a six-month window. 15 U.S.C. §78p(b). An insider may be a corporate officer, director or 10% shareholder. *Id.* at (a)(1). If any corporate insider engages in short-swing trades, a shareholding may bring suit on behalf of the company, forcing the insider to disgorge all profits to the company. *Id.* at (b). Plaintiff seeks to paint the Kellett Defendants as insiders on the grounds: (1) that Mr. Cunningham was "deputized" to act as Kellett Partners' representatives; and (2) that the Kellett Partners acted as a "group" with Mr. Lumry's Acorn Ventures to become 10% shareholders.

This matter is before the Court on summary judgment. The Court grants summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The underlying facts are viewed in the light most favorable to the party opposing the motion, here the Plaintiff. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). "Summary judgment will not lie if ... the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

1. Deputization

The Supreme Court recognized Plaintiff's deputization theory in *Blau v. Lehman*, 368 U.S. 403 (1962). Although this deputization theory has never been codified by statute, it is clear that a defendant may incur liability under Section 16(b) as a "director" by deputizing one or more persons to represent his or her interest by serving on a company's board of directors. *Feder v. Martin Marietta Corp.*, 406 F.2d 260, 263 (2d Cir. 1969), *cert. denied*, 396 U.S. 1036 (1970). Deputization is a question of fact. *Id.* Both parties point the Court to the leading *Blau* and *Feder* cases.

The Supreme Court in *Blau* refused to impose liability on defendant Lehman Brothers under the deputization theory. In *Blau*, a partner at Lehman Brothers was a director of a corporation called Tide Water. Both the partner and Lehman Brothers engaged in short-swing trades of Tide Water. As a director, the partner had to declare or disgorge transactions and profits as an insider, but Lehman Brothers claimed it did not since it was not a director, officer, or 10% shareholder. The Supreme Court upheld the lower court's finding of fact that the partner was not deputized to act on Lehman Brother's behalf. The plaintiff in *Blau* appeared to raise a genuine issue of fact, however. On the one hand, there was evidence that the partner had joined Tide Water thinking "it was going to be in the interests of Lehman Brothers." 368 U.S. at 406. On the other hand, there was testimony that the partner had never discussed the operating details of Tide Water with any member of Lehman Brothers, and that Lehman Brothers had bought Tide Water stock without consulting the partner. *Id.* With little evidence that any inappropriate communications had occurred between Lehman and the partner, the court concluded that the mere fact that a partner in Lehman Brothers was a director at Tide Water did not prove deputization. *Id.* at 407.

In *Feder*, the Second Circuit reversed a district court finding, concluding that the evidence demonstrated deputization when the CEO and President of Martin Marietta also served on the board of Sperry Rand Corporation ("Sperry"). The *Feder* court noted that the Martin Marietta CEO controlled Martin Marietta investments and, as a board member of Sperry, the CEO also had access to significant insider information. 406 F.2d at 265-66. Furthermore, the CEO discussed operating details of Sperry with Martin Marietta. *Id.* Also, evidence indicated that the Martin Marietta CEO was on Sperry's board to "protect" Martin Marietta's investment in Sperry. *Id.* In fact, Martin Marietta placed numerous representatives or deputies on boards of other corporations. *Id.* In finding deputization to exist, *Feder* distinguished Martin Marietta's actions from that of Lehman Brothers in *Blau*: "In contrast, in *Blau v. Lehman*, where Lehman Brothers was the alleged director, the Lehman partner exercised no power of approval concerning the partnership's investment; was not consulted for advice; had no advance knowledge of Lehman Brothers' intention to purchase the stock of the corporation ...; and never discussed the operating details of that corporation's affairs with any member of Lehman Brothers." *Id.* at 265.

Plaintiff raises a genuine issue of material fact regarding whether Mr. Cunningham was deputized by the Kellett Defendants. As in Feder, Mr. Cunningham had access to and passed on apparently confidential financial information. Evidence suggest that Mr. Cunningham helped analyze InfoSpace as an investment for the Kellett Defendants by assisting in compiling quarterly reports. Unlike the facts in Blau, Mr. Kellett heavily relied on Mr. Cunningham for making trading decisions. Mr. Cunningham helped Mr. Kellett obtain a large number [of] pre-IPO shares consistent with those of a director. Like Martin Marietta, Mr. Cunningham served on the boards of a number of different companies in which the Kellett Defendants invested. Whether these actions take place in the ordinary course of business, as Defendants allege, is a fact issue. Based on this evidence, a reasonable fact-finder could decide that Mr. Cunningham was deputized and placed on the InfoSpace board not to further the interests of the shareholders but of the Kellett Defendants. [Defendant's] motion for summary judgment on the "deputization theory" is DENIED.

II. Group Theory

Plaintiff also tries to reach the Kellett Defendants as insiders by alleging that they formed a "group" with a 10% interest in InfoSpace with Mr. Lumry. Persons act as a "group" when they "agree to act tougher for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer." 17 C.F.R. § 240.13d-5(b)(1); *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 123 (2d Cir. 2001). This group "need not be committed to acquiring, holding, voting or disposing of securities on a specific set of terms, but the group members must have combined to further a common objective with regard to one of those activities." *Schaffer v. CC Invs.*, 115 F. Supp. 2d 440, 443 (S.D.N.Y. 2000). However, the mere fact that a number of private investors receive the same terms does not demonstrate the existence of a group agreement. *See id.* Plaintiff need not show that the Defendants attempted to gain corporate control or influence corporate affairs, only that the Defendants entered into a relevant agreement. *Morales*, 249 F.3d at 124. Whether Defendants formed a group with Mr. Lumry is a question of fact. *Id.*

The parties do not dispute that Mr. Lumry's and the Kellett Defendants' investments constitute a 10% interest in InfoSpace. A reasonable fact-finder could determine that the Kellett Defendants formed a group and acted together with Mr. Lumry to acquire and/or hold InfoSpace stock. The evidence on summary judgment indicates that Mr. Lumry negotiated the investment terms with Mr. Jain and then invited the Kellett Defendants in through Mr. Cunningham. This fact supports the inference that the Kellett Defendants and Mr. Lumry agreed to act together to acquire and hold the InfoSpace shares. There is evidence that Kellett Partners and Acorn considered working as a "group" to invest in other companies, Meals.com and Web2Store.com. This supports the inference that Kellett Partners and Acorn acted as a group to obtain and hold shares in InfoSpace. A fact-finder could conclude that Mr. Lumry and the Kellett Defendants' objective in acquiring and holding InfoSpace shares was to increase the company's share prices in order to realize a profit on their investment—the "angel" investment philosophy evidenced by the consulting agreement and Acorn and Kellett Partner corporate profiles. Accordingly, [Defendant's] motion for summary judgment on the group theory is DENIED.

III. Statute of Limitations

Defendants argue that suit on at least one of the alleged short-swing trades is barred by the two year statute of limitations in Section 16(b). 15 U.S.C. § 78p(b) (plaintiff must file suit no "more than two years after the date such profit was realized."). Plaintiff filed his complaint on September 26, 2001, and seeks damages for, among others, a trade initiated in December 1998 and completed in February 1999, more than two years before the suit was filed. Plaintiff argues that the statute of limitations is equitably tolled by Defendants' failure to disclose the transaction under Section 16(a).

In the Ninth Circuit, the two year statute of limitations "begins to run when the transactions are disclosed in the insider's § 16(a) report." *Whittaker v. Whittaker*, 639 F.2d 516, 530 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031 (1981). Defendants argue that *Whittaker* is no longer good law after the Supreme Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363-64 (1991). In Lampf, the Court rejected the application of equitable tolling to the 1-and-3-year statute of limitations structure of another provision of the 1934 Securities and Exchange Act, Section 10(b), *Id.* at 363. The Court rejected equitable tolling because: "The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The 3-year limit is a period of repose inconsistent with tolling." *Id.* The two year statute of limitations in Section 16(b), unlike Section 10(b), does not have an explicit "discovery" provision that would render tolling unnecessary. To this Court's knowledge, no other court has read *Lampf* to eliminate equitable tolling in Section 16(b) or to overrule *Whittaker*. On the contrary, courts in other circuits have *adopted* the holding of *Whittaker* well after *Lampf* was decided. *See e.g., Rosen ex rel. Egghead.com, Inc. v. Brookhaven Capital Mgmt. Co.*, 179 F. Supp. 2d 330, 337 (S.D.N.Y. 2002). The two year statute of limitations in Section 16(b) is tolled until the transactions are disclosed under the Section 16(a).

It is undisputed that Defendants never disclosed the transactions at issue here, namely because Defendants allege they were not insiders and had no duty to disclose under Section 16(a). Accordingly, Plaintiff's suit is not barred by the statute of limitations.

CONCLUSION

Plaintiff raises a genuine issue of material fact regarding whether: (1) the Kellett Defendants deputized Mr. Cunningham as their representative on the InfoSpace board; and (2) the Kellett Defendants acted with Mr. Lumry as a group. If the Kellett Defendants are insiders who failed to disclose their trades, the statute of limitations for this action is tolled. Accordingly, Defendants' Motion for Summary Judgment is DENIED. (Dkt. No. 61.)

Dated: February 13, 2003

/s/
Marsha J. Pechman
United States District Judge

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
AUG 18 2011
OFFICE OF THE CLERK

No. 10-1261

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

VANESSA SIMMONDS,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

BRIEF FOR PETITIONERS

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August 18, 2011

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QUESTION PRESENTED

Whether the two-year time limit for bringing an action under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is subject to tolling, and, if so, whether tolling continues even after the receipt of notice of the facts giving rise to the action.

CORPORATE DISCLOSURE STATEMENT

Petitioner Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Petitioner Citigroup Global Markets Inc. is a wholly owned subsidiary of Citigroup Financial Products Inc., which in turn is a wholly owned subsidiary of Citigroup Global Markets Holdings Inc., which in turn is a wholly owned subsidiary of Citigroup, Inc., a publicly held corporation. No other publicly held company owns 10% or more of Citigroup Global Markets Inc.'s stock.

Petitioner Credit Suisse Securities (USA) LLC is a wholly owned subsidiary of Credit Suisse (USA) Inc., which in turn is a wholly owned subsidiary of Credit Suisse Holdings (USA) Inc., which in turn is a jointly owned subsidiary of: (1) Credit Suisse Group AG Guernsey Branch, which is a branch of Credit Suisse Group AG, which is a corporation organized under the laws of Switzerland and whose shares are publicly traded on the Swiss Stock Exchange and are also listed on the New York Stock Exchange in the form of American Depositary Shares, and (2) Credit Suisse AG, which itself is a wholly owned subsidiary of Credit Suisse Group AG and which has certain publicly registered securities. No publicly held company owns 10% or more of Credit Suisse Group AG.

Petitioner Deutsche Bank Securities Inc. is a jointly owned subsidiary of Deutsche Bank AG, Taunus Corporation, and DB U.S. Financial Markets Holding Corporation. No other publicly held company owns 10% or more of its stock.

Petitioner Goldman, Sachs & Co. is an indirectly wholly-owned subsidiary of The Goldman Sachs Group, Inc. ("GS Group"), which is a corporation organized under the laws of Delaware and whose shares are publicly traded on the New York Stock Exchange. To the best of GS Group's knowledge, no publicly held company owns 10% or more of the common stock of GS Group.

Petitioner J.P. Morgan Securities Inc. is a wholly owned subsidiary of JPMorgan Chase & Co., a public company whose shares are traded on the New York Stock Exchange. J.P. Morgan Securities Inc. is the surviving entity in the October 1, 2008 merger between J.P. Morgan Securities Inc. and Bear, Stearns & Co Inc., a former U.S. broker-dealer subsidiary of The Bear Stearns Companies Inc. No other publicly held company owns 10% or more of J.P. Morgan Securities Inc.'s stock.

Petitioner Merrill Lynch, Pierce, Fenner & Smith, Incorporated is a wholly-owned subsidiary of Merrill Lynch & Co., Inc., which is a direct subsidiary of Bank of America Corporation, which owns all of the common stock of Merrill Lynch & Co., Inc.

Petitioner Morgan Stanley & Co. LLC, formerly known as Morgan Stanley & Co. Incorporated, is a wholly owned subsidiary of Morgan Stanley, a publicly held corporation whose shares are traded on the New York Stock Exchange. No other publicly held company owns 10% or more of its stock.

Petitioner Robertson Stephens, Inc. (now merged into a new entity called Robertson Stephens Group, Inc.) is a wholly-owned subsidiary of Bank of America Corporation. No other publicly held company owns 10% or more of its stock.

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INTRODUCTION

This case represents yet another attempt to repackage decade-old allegations of wrongdoing in connection with the initial public offerings (IPOs) of equity securities during the stock market boom of 1998-2000. In 2001, private plaintiffs filed more than one thousand securities class actions making such allegations against the IPO underwriters. Similarly, starting in 2002, the Securities and Exchange Commission (SEC) filed civil enforcement actions making the same allegations against various underwriters. And some private plaintiffs even made the same allegations in suing the underwriters under the federal antitrust laws—actions that this Court ultimately rejected in *Credit Suisse Secs. (USA) LLC v. Billing*, 551 U.S. 264 (2007).

Shortly after this Court's *Billing* decision, and more than six years after the last of the disputed IPOs, respondent filed the lawsuits at issue here. Respondent's complaints parroted the factual allegations of the earlier litigation, but for the first time characterized those allegations as violations of Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b). That provision allows a corporate issuer of securities (or, after adequate demand on the issuer, an owner of the issuer's securities) to bring a suit to recover "any profit" made by a covered person through a "short swing" purchase and sale of the issuer's securities within a six-month period.

Because Section 16(b) also specifies that "no such suit shall be brought more than two years after the date such profit was realized," 15 U.S.C. § 78p(b), petitioners moved as a threshold matter to dismiss these lawsuits as time-barred. The district court granted the motion, noting that "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a. But the Ninth Circuit reversed, holding that the two-year time limit for bringing a Section 16(b) action "begins to run" only when the defendant discloses the relevant purchases or sales of securities in a filing with the SEC under Section 16(a), 15 U.S.C. § 78p(a), *regardless* of whether and when the plaintiff knew or should have known the facts underlying the action. Pet. App. 66a (relying on *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981)).

That holding has no basis in law or logic. Section 16(b) by its plain terms *specifies* when the two-year time limit begins to run: on "the date such [short-swing] profit was realized." 15 U.S.C. § 78p(b). By selecting the date the defendant engaged in challenged conduct, rather than the date the plaintiff discovered such conduct, as the trigger for the statutory time limit, Congress indicated that such discovery should not extend that limit. And Congress confirmed the point in companion provisions of the Exchange Act, which look to a plaintiff's discovery of the facts underlying a claim to *shorten*, not *lengthen*, statutory time limits. Indeed, by reference to these companion provisions, this Court already has characterized Section 16(b)'s time limit as a "period of repose" that cannot be extended. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 n.5 (1991); *see also id.* at 375 (Kennedy, J., dissenting).

This Court should now confirm that it meant what it said in *Lampf*: "Section 16(b) ... sets a 2-year ... period of repose," which renders that provision "more restrictive" than companion provisions of the Exchange Act that set 3-year periods of repose. 501 U.S. at 360 & n.5. This approach reflects the statutory text and harmonizes companion provisions of the Exchange Act. Under this approach, this Court should reverse the decision below.

And this Court should reverse that decision even if it were inclined to allow an extra-textual extension of Section 16(b)'s two-year time limit. Under no circumstances is there any basis for extending that time limit beyond the point at which a reasonably diligent securities owner knew, or should have known, the facts underlying a Section 16(b) action. The Second Circuit adopted a variant of this "notice" approach in *Litzler v. CC Invs., L.D.C.*, 362 F.3d 203, 206-07 (2d Cir. 2004). Here, as noted above, "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the [issuing companies] for at least five years before these cases were filed." Pet. App. 107a. Accordingly, regardless of whether this Court adopts either a "repose" approach or a "notice" approach, this Court should reverse the Ninth Circuit's judgment.

RELEVANT STATUTORY PROVISIONS

The full text of Section 16 of the Securities Exchange Act of 1934, 15 U.S.C. § 78p, is reproduced at Pet. App. 112-15a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The Securities Exchange Act of 1934 is a "landmark" statute, *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 170-71 (1994), enacted, among other things, "to insure the maintenance of fair and honest markets," Exchange Act § 2, 15 U.S.C. § 78b. To achieve that goal, the Act contains a number of requirements designed to promote transparency and oversight of securities transactions. *See*, *e.g.*, Exchange Act § 12(g), 15 U.S.C. § 78l(g) (requirement that an issuer with a certain number of shareholders and a certain amount of assets register securities with the Commission and make public disclosures); Exchange Act § 13(a), 15 U.S.C. § 78m(a) (requirement that securities issuers must file certain disclosure statements with the SEC).

As relevant here, Section 16(a) of the Exchange Act, 15 U.S.C. § 78p(a), requires "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of [a qualifying] equity security ..., or who is a director or an officer of the issuer of such security," to disclose purchases and sales of the issuer's securities to the SEC. *Id.* § 78p(a)(1). The disclosure statement must set forth "the amount of all equity securities of such issuer" that the filer beneficially owns, and must be updated in the event of a change of ownership. *Id.* § 78p(a)(3).

A change of ownership disclosure is made by filing a so-called "Form 4." *See* 17 C.F.R. § 240.16a-3(a). That form sets forth the filer's name, the date of the transaction, the number of shares sold or bought, and the price per share. *See* Securities & Exch. Comm'n, ***Ownership Reports and Trading by Officers, Directors and Principal Security Holders,*** 56 Fed. Reg. 7242, 7278-81 (Feb. 21, 1991); Pet. Opp. App. 1b (sample Form 4). The Government (through the SEC and the Department of Justice) has exclusive authority to enforce Section 16(a), and may pursue a variety of remedies—including injunctive relief, a bar on service as a director or officer, civil monetary penalties, *see* Exchange Act § 21(d)(1), (2), (3), 15 U.S.C. § 78u(d)(1), (2), (3), and even criminal sanctions, *see* Exchange Act § 32(a), 15 U.S.C. § 78ff(a).

In addition to the foregoing disclosure requirements, the Exchange Act also prohibits a number of unfair or deceptive practices. *See, e.g.*, Exchange Act § 9, 15 U.S.C. § 78i (prohibiting willful manipulation of securities prices); Exchange Act § 10, 15 U.S.C. § 78j (prohibiting the use of any manipulative or deceptive device in connection with the purchase or sale of any security); Exchange Act § 18, 15 U.S.C. § 78r (prohibiting misleading securities filings); *see generally Lampf*, 501 U.S. at 358-60 & nn. 4, 6 (describing these various statutory prohibitions).

In contrast to these provisions, Section 16(b)—the provision at issue here—does not prohibit any conduct. Rather, Section 16(b) authorizes an issuer of securities (or, after adequate demand on the issuer, an owner of such securities on the issuer's behalf) to file a lawsuit to recover "any profit" realized by a covered person "from any purchase and sale, or any sale and purchase, of any equity security of such issuer ... within any period of less than six months." 15 U.S.C. § 78p(b). The statute authorizes such recovery "irrespective of any intention" on the defendant's part, *id.*: even the most innocent purchases or sales based solely on information known to the public can trigger the disgorgement of a short-swing profit. Of particular relevance here, the statute also specifies that "no such suit shall be brought more than two years after the date such profit was realized." *Id.*

Recognizing that not all short-swing profits by covered persons pose a risk of abuse, Section 16(b) exempts "any transaction or transactions which the [SEC] by rules and regulations may exempt as not comprehended within the purpose of this subsection." 15 U.S.C. § 78p(b). Pursuant to this provision, the SEC has carved out an "underwriter exemption" to allow underwriters to keep profits from short-swing transactions in the context of public offerings of securities, even if Section 16(b) would otherwise cover the underwriting activity. *See* 17 C.F.R. § 240.16a-7(a) (creating underwriter exemption to Section 16(a)); *see also* 17 C.F.R. § 240.16a-10 (applying underwriter exemption to Section 16(b)).

Given that a Section 16(b) proceeding may be brought only by an issuer or (after an adequate demand upon the issuer) an owner of the issuer's securities on the issuer's behalf, any monies recovered through such a proceeding "inure to" the issuer. 15 U.S.C. § 78p(b). Although Section 16(b)—unlike other provisions of the Exchange Act, *see, e.g.*, Exchange Act § 9(e), now redesignated 15 U.S.C. § 78i(f); Exchange Act § 18(a), 15 U.S.C. § 78r(a)—does not authorize an award of attorneys' fees to the prevailing party, the lower courts have long awarded attorneys' fees to successful Section 16(b) plaintiffs, *see, e.g.*, *Smolowe v. Delendo Corp.*, 136 F.2d 231, 241 (2d Cir. 1943).

B. The IPO Litigation

The late 1990s witnessed intense investor interest in high technology and Internet-related stocks. In this "bubble" market, many companies sought to raise capital by selling shares to the public, and hired investment banks to underwrite IPOs. "An IPO presents an opportunity to raise capital for a new enterprise by selling shares to the investing public." *Billing*, 551 U.S. at 268.

In an IPO, the underwriter (or a syndicate of underwriters) estimates likely market demand for an issuer's shares and works with the issuer to determine the price and the number of shares to be issued. *See id.* at 268-69. Ultimately, in a firm commitment underwriting, the underwriter agrees to buy all of the newly issued shares on a fixed date at a fixed price filed with the SEC, which the underwriter then sells to the public at a slightly higher fixed price also filed with the SEC. *See id.*; *see also* SEC Regulation S-K, 17 C.F.R. § 229.10 *et seq.* (The spread between the fixed price at which the underwriter buys and sells the shares amounts to its commission, *see Billing*, 551 U.S. at 268; with certain exceptions, the underwriter is barred from buying shares in the IPO, *see* SEC Regulation M, 17 C.F.R. § 242.101.) In the overheated stock market of the late 1990s, the price of shares often increased appreciably after their initial sale, to the benefit of those investors who were able to purchase shares from the underwriters at the fixed IPO price.

After peaking in March 2000, the stock market bubble burst by the end of that year, leaving many investors with losses. Some of those investors set their sights on the investment banks that had underwritten the IPOs. Starting in January 2001, over one thousand securities class actions were filed in the U.S. District Court for the Southern District of New York against the underwriters in connection with more than three hundred IPOs of the late 1990s. That court transferred all of the actions to a single judge, who consolidated and presided over them. *See In re Initial Pub. Offering Sec. Litig. (IPO)*, 241 F. Supp. 2d 281, 293-94 (S.D.N.Y. 2003); *see also In re Initial Pub. Offering Sec. Litig. (Miles)*, 471 F.3d 24, 27 (2d Cir. 2006), *clarified on denial of rehearing*, 483 F.3d 70 (2d Cir. 2007).

The *IPO* plaintiffs alleged that the underwriters unlawfully abused their power to allocate shares in an IPO to extract additional consideration from buyers above and beyond the fixed price filed with the SEC. In particular, the *IPO* plaintiffs alleged that the underwriters helped to foment a speculative frenzy by issuing overly optimistic research recommendations on IPO stocks, underpricing IPOs, and entering into "laddering" arrangements whereby their customers agreed to buy additional shares of an IPO stock at escalating prices in the aftermarket. Pet. App. 83-84a; *IPO*, 241 F. Supp. 2d at 294, 314-21; *Miles*, 471 F.3d at 43. The *IPO* plaintiffs further alleged that the underwriters received "kickbacks" from the customers to whom they allocated IPO shares through increased investment banking business, "tying" arrangements (*i.e.*, agreements to purchase less attractive securities), and inflated commissions on unrelated transactions. *See* Pet.

App. 84a; *IPO*, 241 F. Supp. 2d at 294, 320; *Miles*, 471 F.3d at 43. The *IPO* plaintiffs alleged that these practices violated various provisions of the federal securities laws, including Sections 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b), 78t(a). *See IPO*, 241 F. Supp. 2d at 314, 392. Notably, however, the *IPO* plaintiffs did not allege that these practices violated Section 16 of the Exchange Act. The parties to the *IPO* litigation eventually agreed to a series of classwide settlements, which are now being challenged by a single remaining objector.

The SEC also filed (and promptly settled) civil enforcement actions against various underwriters arising out of the same alleged wrongdoing in connection with the same IPOs. *See, e.g.*, Compl., *SEC v. Credit Suisse First Boston Corp.*, No. 1:02-cv-00090 (D.D.C. filed Jan. 22, 2002), Joint Appendix (JA) 141-69. Like the private plaintiffs, the Commission alleged that the underwriters had violated various provisions of the federal securities laws. Notably, however, the SEC did not allege that these underwriters had violated Section 16 of the Exchange Act.

Some private plaintiffs even sued the underwriters under the federal antitrust laws for the very same alleged wrongdoing, and that litigation eventually reached this Court. *See Billing*, 551 U.S. 264. After carefully describing the plaintiffs' allegations—including "laddering," "tying," and excessive commissions, *id.* at 269-70—the *Billing* Court held that the antitrust laws do not encompass what are essentially securities claims, and that the plaintiffs' antitrust claims thus fail as a matter of law, *see id.* at 278-85.[1]

C. These Lawsuits

When this Court decided *Billing* in 2007, respondent Vanessa Simmonds was a college student and the daughter of "a securities lawyer with experience in Section 16(b) litigation." Pet. App. 82a, 107-08a. At that time, respondent's father—who is one of her attorneys in this case—bought her stock in 55 companies that had issued shares in the IPOs of the late 1990s that were challenged in the *IPO* litigation. Pet. App. 82-83a, 107-08a.

Shortly after the purchase of these securities, respondent filed 55 virtually identical complaints in the U.S. District Court for the Western District of Washington. (She subsequently voluntarily dismissed one of the complaints. Pet. App. 82a n.4.)

Each complaint parroted the factual allegations of wrongdoing that had been made by the private plaintiffs in the *IPO* and *Billing* litigation and by the SEC in its enforcement actions. Pet. App. 85a; *compare* JA 54-64 (sample complaint) *with* JA 141-69 (sample SEC complaint). In particular, the complaints alleged that petitioners, the IPO underwriters, "directly and indirectly ... created the opportunity for themselves to directly and indirectly profit or share in any profits derived from the transactions of their customers in [the IPO] stock." JA 58. The complaints also alleged underpricing and "laddering" arrangements with the objective of "inflating the aftermarket price of [IPO] stock to a level sufficiently above the IPO price to enable [the underwriters] to directly and indirectly reap substantial profits from the sale of [IPO] stock." JA 58-60.

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[1] Justice Stevens, concurring in the judgment, further explained that "[a]fter the initial purchase, the prices of newly issued stocks or bonds are determined by competition among the vast multitude of other securities traded in a free market," and dismissed as "frivolous" the suggestion "that an underwriting syndicate can restrain trade in that market by manipulating the terms of IPOs." *Billing*, 551 U.S. at 286 (opinion concurring in the judgment).

Respondent's complaints, however, for the first time characterized the alleged IPO wrongdoing as a violation of Section 16(b) of the Exchange Act. *See, e.g.*, JA 63. In particular, the complaints alleged that petitioners qualified as "beneficial owners" of 10% or more of the issuers' stock (and hence were covered by Section 16(b)) by virtue of their relationships with the issuers' officers and directors as well as with their own customers, JA 61, and that they had "profited from Short-Swing Transactions in [IPO] stock by engaging in such transactions within periods of less than six months during the Relevant Period." JA 63. Each complaint alleged that petitioners were not covered by the "underwriter exemption," because they "lacked good faith in connection with their IPO underwriting and distribution activities." JA 58-59. And each complaint alleged that petitioners "failed to report the Short-Swing Transactions as required under ... Section 16(a) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78p(a), thereby tolling the two-year statute of limitations set forth in Section 16(b)." JA 62.

Petitioners moved to dismiss the complaints on a variety of grounds, including Section 16(b)'s prohibition on suits "brought more than two years after the date such [short-swing] profit was realized." 15 U.S.C. § 78p(b). The district court (Robart, J.) granted the motions, and dismissed all 54 complaints. Pet. App. 78-111a. With respect to the 24 complaints on which the district court reached the timeliness issue, the court concluded that they were untimely as a matter of law. Pet. App. 103-10a.[2]

The district court recognized that, under the Ninth Circuit's decision in ***Whittaker***, "an insider's failure to disclose covered transactions in the required Section 16(a) reports tolls the two-year limitations period" until "the transactions are disclosed in the insider's Section 16(a) report." Pet.

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[2] The district court dismissed 30 of the complaints without prejudice on the alternate threshold ground that respondent had not made an adequate demand on the issuer under Delaware law before filing a Section 16(b) claim on the issuer's behalf. Pet. App. 92-102a. The Ninth Circuit affirmed the dismissal of those 30 complaints, but held that the dismissal should have been *with* prejudice. Pet. App. 66-70a. Respondent sought this Court's review of that aspect of the Ninth Circuit's decision, but this Court denied her petition for certiorari. *Simmonds v. Credit Suisse Securities (USA) LLC*, No. 10-1218, __ S. Ct. __, 2011 WL 1343555 (U.S. June 27, 2011). Accordingly, those 30 lawsuits are now over, and this case involves only the 24 lawsuits that the district court dismissed on timeliness grounds. None of these 24 lawsuits has been the subject of a motion to dismiss based on the inadequacy of respondent's demand; indeed, the demand letters in these cases are not in the record. *See* Pet. App. 68-70a. Moreover, four of these cases involve non-Delaware issuers, in which the adequacy of respondent's demands will not be governed by Delaware law. Pet. App. 68-69a.

App. 105-06a (citing *Whittaker*, 639 F.2d at 527). The court concluded, however, that *Whittaker* does not control this case. As the court explained, respondent's Section 16(b) actions are "based on the same set of facts as presented in *In re IPO*, albeit under a new theory of liability and almost six years later." Pet. App. 85a (emphasis added). Thus, "unlike *Whittaker* and other cases employing the equitable tolling doctrine in Section 16(b) cases, there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the [issuing companies] for at least five years before these cases were filed." Pet. App. 107a; *see also id.* at 108a ("[T]he only significant development occurring within the last two years was [respondent's] acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed.").

The Ninth Circuit reversed the district court's dismissal of the 24 complaints at issue here as time-barred. Pet. App. 61-66a. In particular, the court of appeals rejected the district court's attempt to distinguish *Whittaker* on factual grounds, declaring that "the central holding of our opinion in *Whittaker*—both in our legal analysis and our application of the law to the facts of that case—is that the Section 16(b) statute of limitations is tolled until the [defendant] discloses his transactions in a Section 16(a) filing, *regardless* of whether the plaintiff knew or should have known of the conduct at issue." Pet. App. 63a (emphasis added); *see also* Pet. App. 65a ("[O]ur decision in *Whittaker* created a blanket rule that applies in *all* Section 16(b) actions.") (emphasis in original); Pet. App. 66a

("[T]he fundamental holding of *Whittaker* is that Section 16(b)'s two-year statute of limitations begins to run from the time that the defendant files a Section 16(a) disclosure statement."). The Ninth Circuit thus concluded that the two-year time limit for filing a Section 16(b) action *had not even started to run*, because petitioners had not filed disclosure forms under Section 16(a). Pet. App. 66a.

Judge Milan Smith, who authored the Ninth Circuit's opinion, wrote a special concurrence to highlight his misgivings about *Whittaker*. Pet. App. 72-75a. Noting that "the statutory text and statutory structure clearly point toward the repose approach," Judge Smith explained that—"[w]ere it not for *Whittaker*"—he "would hold that Section 16(b) suits may not be brought more than two years after the short-swing trades take place." Pet. App. 75a.

The court of appeals, over Judge Smith's objection on this issue, denied panel rehearing and rehearing *en banc*. Pet. App. 76-77a. This Court granted certiorari.

SUMMARY OF ARGUMENT

By its plain terms, Section 16(b) authorizes a private lawsuit to recover short-swing profits realized by certain covered persons, but specifies that "no such suit shall be brought more than two years after the date such [short-swing] profit was realized." 15 U.S.C. § 78p(b). Because respondent brought these lawsuits more than two years after the date the short-swing profits she alleges were realized, these lawsuits are untimely, and the district court correctly dismissed them.

There is no basis for courts to extend Section 16(b)'s two-year time limit. Although courts generally construe federal statutes in light of certain background rules, including rules governing the accrual of a cause of action and the tolling of a time limit, such background rules do not apply indiscriminately to all federal statutes regardless of their text, structure, and history.

Here, statutory text, structure, and history combine to establish that Section 16(b)'s two-year time limit begins to run on the date a covered person realizes a short-swing profit, and is not thereafter subject to tolling. The language of Section 16(b) is classic language of repose: the two-year time limit starts to run from the date of the defendant's challenged conduct. Companion provisions of the Exchange Act underscore that Congress knew how to trigger a statutory time limit by reference to a plaintiff's discovery of the facts underlying a claim, and chose not to do so in Section 16(b). Particularly because the textual discovery provisions in these companion provisions *shorten* statutory time limits, courts cannot invoke extra-textual discovery rules to *lengthen* the time limit in Section 16(b). Thus, as this Court explained in *Lampf*, Section 16(b) establishes a two-year "period of repose" after which a defendant is no longer subject to suit.

But even if there were some extra-textual basis to extend Section 16(b)'s two-year time limit, it would not yield the Ninth Circuit's categorical rule that the time limit never begins to run until the defendant files a Section 16(a) disclosure form. The Ninth Circuit made up that rule—which potentially extends the time limit indefinitely—out of whole cloth. No background rule supports the Ninth Circuit's approach, and no background rule would render these lawsuits timely. The "discovery accrual" rule does not apply because Section 16(b) specifies when a Section 16(b) claim accrues—the date such [short-swing] profit was realized," 15 U.S.C. § 78p(b)—and in any event that rule is generally limited to fraud claims. And the equitable tolling doctrine cannot justify the Ninth Circuit's rule, or respondent's delay in filing these lawsuits, because that doctrine does not toll a time limit beyond the point at which a reasonably diligent plaintiff knew or should have known the facts underlying an action. Given that, as the district court noted, "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed," Pet. App. 107a, equitable tolling—even if applicable to Section 16(b) in the first place—could not possibly render these lawsuits timely.

ARGUMENT

I. These Actions Are Untimely Because Section 16(b) Establishes A Two-Year Repose Period That Cannot Be Extended.

A. The Language Of Section 16(b) Establishes A Repose Period That Cannot Be Extended.

The analysis here "begin[s], as in any case of statutory interpretation, with the language of the statute." *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 131 S. Ct. 1101, 1107 (2011). Section 16(b) authorizes a lawsuit to recover "short-swing" profits realized by certain covered persons, but specifies, without qualification, that "no such suit shall be brought more than two years after the date such profit was realized." 15 U.S.C. § 78p(b).

By its plain terms, the statute identifies the date on which the two-year time limit for bringing an action starts to run—"the date such profit was realized." *Id.* And the statute defines that date, in turn, solely by reference to the defendant's conduct.

That is the classic formulation of a statute of repose. *See Black's Law Dictionary* 1546 (9th ed. 2009) (defining "statute of repose" as "[a] statute barring any suit that is brought after a specified time since the defendant acted"); 54 C.J.S., *Limitation of Actions* § 5, at 22-23 (2005) (same; citing common-law cases); *Ma v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 597 F.3d 84, 88 n.4 (2d Cir. 2010) ("A statute of limitations creates an affirmative defense where plaintiff failed to bring suit within a specified period of time after his cause of action accrued, often subject to tolling principles. ... By contrast, a statute of repose extinguishes a plaintiff's cause of action after the passage of a fixed period of time, usually measured from one of the defendant's acts.") (emphasis and internal citations omitted); *In re Exxon Mobil Corp. Sec. Litig.*, 500 F.3d 189, 199-200 (3d Cir. 2007) (same).

And the whole point of a statute of repose—as well as what distinguishes it from a plain-vanilla statute of limitations—is that it cannot be extended to account for a plaintiff's discovery of the facts underlying a claim. *See, e.g.*, *Lampf*, 501 U.S. at 363; *see also* 4 Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 1056, at 239-40 (3d ed. 2002); Calvin W. Corman, *Limitations of Actions* § 1.1, at 4-

5 (1991). If a statute of repose could be extended, it would cease to be a statute of repose. *See, e.g., Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (noting that tolling does not apply to statutes of repose because "their very purpose is to set an outer limit unaffected by what the plaintiff knows").

Needless to say, Congress easily could have chosen a different trigger date for Section 16(b)'s two-year time limit, such as the date a plaintiff discovered, or should have discovered, the challenged conduct, or the date the defendant filed the disclosure forms required by Section 16(a). Indeed, as described in detail below, Congress *did* choose the plaintiff's discovery of the defendant's challenged conduct as the trigger date for other time limits in the very same statute.

B. The Structure Of The Exchange Act Confirms That Section 16(b) Establishes A Repose Period That Cannot Be Extended.

The structure of the Exchange Act confirms that Congress meant what it said when it established an unqualified two-year time limit for bringing a Section 16(b) action, and that the absence of a statutory extension mechanism was no oversight.

Section 16(b) is part of a comprehensive statute, the Securities Exchange Act of 1934. As this Court explained in *Lampf*, that statute created various causes of action and set various time limits for them. *See* 501 U.S. at 359-60 & n.6. Of particular relevance here, both Sections 9(e) and 18(c) of the Act establish dual time limits whereby an action must be brought "within one year after the discovery of the facts constituting" a Section 9 "violation" or a Section 18 "cause of action," and "within three years after" such "violation" or "such cause of action accrued." Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c).

The dual structure of these companion provisions underscores that Congress knew perfectly well how to link a time limit to a plaintiff's "discovery" of the facts underlying an action when it wanted to do so. Yet it did not do so in Section 16(b). Instead, as noted above, Congress designated the realization of a short-swing profit by a covered person as the relevant triggering event.

The juxtaposition of a "discovery" time limit with an outer time limit in Sections 9(e) and 18(c) also shows that the outer time limit of these dual-structure provisions is a period of repose that cannot be extended, regardless of when the plaintiff discovers a claim. *See Lampf*, 501 U.S. at 363 ("'The inclusion of the three-year period can have no significance in this context other than to impose an outside limit.'") (quoting Harold S. Bloomenthal, *The Statute of Limitations & Rule 10b-5 Claims: A Study in Judicial Lassitude*, 60 U. Colo. L. Rev. 235, 288 (1989)). *Lampf* adopted this dual structure for the cause of action implied under Section 10(b) of the Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. *See* 501 U.S. at 364 & n.9.[3]

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[3] This Court recently reaffirmed that the outer limit of the Exchange Act's dual-structure provisions cannot be extended. *See Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010) . That case, like *Lampf*, involved the time limit for filing the action implied under Section 10(b) of the Exchange Act, 15 U.S.C.

(cont'd ...)

Although the two-year time limit in Section 16(b) does not track the dual structure of the time limits in Sections 9(e) and 18(c), the latter provisions nonetheless shed substantial light on the former's meaning. It is hard to imagine a better guide to the meaning of a statutory provision than "contemporaneously enacted" provisions of the very same statute. *Lampf*, 501 U.S. at 359. Because the dual time limits in Sections 9(e) and 18(c) of the Exchange Act were enacted at the same time as the two-year time limit in Section 16(b) of the Act—all were part of the original Exchange Act, Pub. L. No. 73-291, 48 Stat. 881—they must be construed as a sensible whole.

A comparison of Section 16(b) with the dual-structure provisions underscores why the two-year time limit in Section 16(b) establishes a period of repose like the outer limit of those provisions. As an initial matter, the language of Section 16(b)'s two-year time limit is virtually identical to the language

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§ 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5. By then, Congress had codified *Lampf* as part of the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, but had extended the dual one- and three-year time limits to two and five years respectively, *see* 28 U.S.C. § 1658(b). Although *Merck* involved the two-year "discovery" prong of that dual-structure provision, the Court interpreted that provision in part by reference to its companion five-year outer limit. Thus, the Court rejected a concern that its interpretation of the two-year discovery prong "will give life to stale claims or subject defendants to liability for acts taken long ago" by noting that "Congress' inclusion in the statute of an unqualified bar on actions instituted '5 years after such violation' giv[es] defendants *total repose* after five years." 130 S. Ct. at 1797 (emphasis added; quoting 28 U.S.C. § 1658(b)).

of the outer limit of the companion dual-structure provisions. *Compare* Exchange Act § 16(b), 15 U.S.C. § 78p(b) ("[N]o such suit shall be brought more than two years after the date such profit was realized.") *with* Exchange Act § 9(e), 15 U.S.C. § 78i(f) ("No action shall be maintained to enforce any liability created under this section, unless brought ... within three years after such violation.") *and* 28 U.S.C. § 1658(b) ("[A] private right of action ... may be brought not later than ... 5 years after such violation."); *see generally* Pet. App. 72-73a (M. Smith, J., specially concurring) (noting that "[t]here is little meaningful distinction between the language" of the outer limit of the dual-structure provisions and the time limit in Section 16(b)).

Even more telling, the companion dual-structure provisions of the Exchange Act use a plaintiff's discovery of the facts underlying his claims to *shorten*, not *lengthen*, a statutory time limit. *See* Bloomenthal, *Judicial Lassitude*, 60 U. Colo. L. Rev. at 288 ("The commencement of one of the periods of limitation with discovery of the violation reflected a consensus that one should not have the full statutory period to initiate an action after discovery of the alleged fraud."). Usually, of course, a "discovery" rule operates just the opposite way—to extend a time limit where the plaintiff did not know, or have reason to know, the facts underlying a claim. *See, e.g.*, 18 U.S.C. § 1030(g) ("No action may be brought under this subsection unless such action is begun within 2 years of the date of the act complained of or the date of the discovery of the damage."); 18 U.S.C. § 2710(c)(3) ("No action may be brought under this subsection unless such action is begun within 2 years from the date of the act complained of or the date of discovery.").

Where, as here, Congress enacted an explicit discovery rule to *shorten* a statutory time limit, Congress would not have relied on an unwritten discovery rule to *lengthen* another time limit in the same statute. The inclusion of a textual discovery rule shows that Congress did not "intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *United States v. Brockamp*, 519 U.S. 347, 352 (1997); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("Congress implicitly excluded a general discovery rule by explicitly including a more limited one."); *Carr-Consol. Biscuit Co. v. Moore*, 125 F. Supp. 423, 431-32 & n.24 (M.D. Pa. 1954) (concluding, in part by reference to the dual-structure time limits of Sections 9(e) and 18(c) of the Exchange Act, that Section 16(b)'s two-year time limit cannot be extended).

In addition, it would be anomalous to construe the companion dual-structure provisions, but not Section 16(b), to create a period of repose, given that the dual-structure provisions involve *intentional* wrongdoing—even insider-trading or securities fraud. *See, e.g.*, Exchange Act § 9(e), 15 U.S.C. § 78i(f) (creating a cause of action against any person who "willfully" participates in transactions involving manipulation of securities prices); Exchange Act § 18(a), 15 U.S.C. § 78r(a) (creating a cause of action against any person who makes a false or misleading statement in a document filed with the Commission, unless that person "acted in good faith and had no knowledge that such statement was false or misleading"); 28 U.S.C. § 1658(b) (creating dual-structure time limit for "a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws").

Section 16(b), in sharp contrast, contains no *scienter* requirement, and by its terms operates "irrespective of any intention" by the defendant. 15 U.S.C. § 78p(b); *see also Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972) ("Section 16(b) imposes *strict liability* upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation.") (emphasis added). Indeed, Section 16(b) does not even prohibit a covered person from engaging in "short-swing" securities transactions at all. Rather, the statute simply ensures that he may not "profit" from any such transactions—he may "'get out what he put in, but [must] give the corporation the profit.'" *Foremost-McKesson, Inc. v. Provident Secs. Co.*, 423 U.S. 232, 251 n.26 (1976) (quoting Hearings on Stock Exchange Practices before the Senate Committee on Banking and Currency, 73d Cong., 2d Sess. 6556-57 (1934)).

Congress would not have given repose to defendants who may have engaged in knowing securities violations—even insider-trading or fraud—but denied repose to defendants who may have realized entirely innocent short-swing profits subject to the "strict prophylactic rule" of Section 16(b). *Foremost-McKesson,* 423 U.S. at 251; *see also Reliance Elec.*, 404 U.S. at 422 (describing Section 16(b) as "prophylactic") (internal quotation omitted);

Blau v. Lehman, 368 U.S. 403, 413-14 (1962) (same). Precisely "[b]ecause [Section 16(b)] imposes liability without fault," this Court has long been "reluctant to exceed a literal, 'mechanical' application of the statutory text" in interpreting the provision's scope. *Gollust v. Mendell*, 501 U.S. 115, 122 (1991) (quoting *Reliance Elec.*, 404 U.S. at 425); *see also Foremost-McKesson*, 423 U.S. at 251 (cautioning against interpreting Section 16(b) beyond its "narrowly drawn limits"); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 594-95 (1973) (cautioning against interpreting Section 16(b) beyond its "strict terms").

It is no accident, thus, that this Court has previously characterized the two-year time limit in Section 16(b) as a "period of repose." *Lampf*, 501 U.S. at 360 n.5. There, the majority compared Section 16(b)'s two-year time limit to the three-year period of repose in the Exchange Act's companion dual-structure provisions, and described it as a "more restrictive" period. *Id.* at 360 & n.5. Similarly, Justice Kennedy, in dissent, wrote that Section 16(b) establishes "a 2-year statute of repose." *Id.* at 375 (dissenting opinion). In short, the overall statutory structure of the Exchange Act confirms the statutory language of repose in Section 16(b).

C. The Legislative History Further Underscores That Section 16(b) Establishes A Repose Period That Cannot Be Extended.

The legislative history of the Exchange Act further underscores that Section 16(b)'s two-year time limit is a period of repose that cannot be extended. Although that time limit "was first inserted in the statute by the conference report," so that "[n]o debate preceded it and none followed," *Grossman v. Young*, 72 F. Supp. 375, 378 (S.D.N.Y. 1947), Congress actually did consider relating the time limit in Section 16(b) to the disclosure required by Section 16(a). In particular, a draft House bill provided that "No such suit may be brought more than six months after such profit was realized if the facts upon which such suit was based were disclosed by a statement filed pursuant to subsection (a), or more than three years after such profit was realized if the facts were not so disclosed." House Comm. on Interstate & Foreign Commerce, 73d Cong., Security Exchange Bill, at 51 (Comm. Print 1934).[4] But Congress did not adopt this approach, and instead adopted a repose approach that tied the time limit *solely* to the date the defendant realized short-swing profits. Congress thus knew perfectly well how to link the time limit for a Section 16(b) action to a Section 16(a) disclosure, but chose not to do so.

The "extensive legislative history" of the Exchange Act's companion time limits confirms the importance that Congress attached to "a policy of repose." Bloomenthal, *Judicial Lassitude*, 60 U. Colo. L. Rev. at 258-59, 262; *see also id.* at 254 ("[U]nder the securities acts, there is every evidence of a strong congressional policy in favor of a period of repose."). The Act, after all created expansive new liability, and Congress was "concern[ed] that directors who might incur liability ... would be reluctant to serve in that capacity without a short period of repose, which would give them some comfort that their estates would not be held liable several years later for their conduct in connection with the offering or sale of securities." *Id.* at 262.

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[4] This draft bill is not included in the Exchange Act's published legislative history, and has been jointly lodged by the parties with the Clerk of this Court.

During "an extensive debate" over the time limits in the Exchange Act, *id.* at 261, Congress recognized that the outer limit of the dual-structure provisions represented a period of repose that could not be extended, *see* 78 Cong. Rec. 8198 (1934) (statement of Sen. Fletcher) (even if the plaintiff has not discovered a fraud, "the person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed"); *see also* Bloomenthal, *Judicial Lassitude*, 60 U. Colo. L. Rev. at 261 & n.180 (observing that Senator Fletcher's views "are generally representative," and characterizing the quoted statement as "sum[ming] up the philosophy of what was being proposed"); *see also Ferguson v. Roberts*, 11 F.3d 696, 705 (7th Cir. 1993) ("The legislative history in 1934 makes it pellucid that Congress included statutes of repose because of fear that lingering liabilities would disrupt normal business and facilitate false claims. It was understood that the three-year [outer limit] was to be absolute.") (internal quotation omitted); Harold S. Bloomenthal, *Statutes of Limitations & the Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (Mar. 1985) (noting that, during debate over various time limits in the Exchange Act, "there was no mention of 'tolling,' and all the participants in the debate agreed that the limitation period was an absolute period"). There is nothing in the legislative history to suggest that this policy of repose applied with any less force to the two-year time limit for bringing an action under Section 16(b).

D. Statutory Text, Structure, And History Leave No Room For Background Rules To Extend Section 16(b)'s Two-Year Time Limit.

Because the text, structure, and history of the Exchange Act combine to establish that the two-year time limit in Section 16(b) is a period of repose that cannot be extended, Congress left no room for courts to extend that time limit by reference to background legal rules. Such background rules are just that—rules that courts may apply where Congress has been *silent* on a particular question. Where Congress has *not* been silent, courts may not invoke background rules to amend Congress' handiwork. *See, e.g.*, *TRW*, 534 U.S. at 27-33; *United States v. Beggerly*, 524 U.S. 38, 48-49 (1998); *Brockamp*, 519 U.S. at 350-52; *Lampf*, 501 U.S. at 363; *cf. Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (background rules apply only "'in the absence of a contrary directive from Congress'") (quoting *Cada*, 920 F.2d at 450).

When it comes to extending statutory time limits, two related—but distinct—background rules potentially come into play. The first is the so-called "discovery accrual" rule, which provides that a fraud claim does not accrue "where a plaintiff has been injured by fraud and 'remains in ignorance of it without any fault or want of diligence or care on his part.'" *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874)); *see also Exploration Co. v. United*

States, 247 U.S. 435, 447-49 (1918); *Sherwood v. Sutton*, 21 Fed. Cas. 1303, 1307 (C.C.D.N.H. 1828) (No. 12,782) (Story, J.); *see generally Merck*, 130 S. Ct. at 1793-94 (describing this rule). Although this Court has extended this background rule to cases of latent disease and medical malpractice, *see, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555 (2000); *United States v. Kubrick*, 444 U.S. 111, 120 & n.7 (1979); *Urie v. Thompson*, 337 U.S. 163, 169-71 (1949)), there is not—and never has been—a general background rule that a statutory time limit for bringing an action starts to run only when the plaintiff discovers the facts underlying such an action. *See, e.g.*, *TRW*, 534 U.S. at 27 (noting that this Court "ha[s] not adopted" any such general background rule); *see also id.* at 37-38 & n.2 (Scalia, J., concurring in the judgment) (rejecting any such general background rule).

The second background rule in this area is the doctrine of "equitable tolling," under which a time limit for bringing suit, having started to run, may nonetheless be suspended, or "tolled," under certain circumstances. *See, e.g.*, *Holland v. Florida*, 130 S. Ct. 2549, 2560-62 (2010); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95 (1990); *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 426-28 (1965). This doctrine, however, does not allow courts to extend statutory time limits at their whim. To the contrary, courts apply equitable tolling "only if [the plaintiff] shows '(1) that he has been pursuing his rights diligently, *and* (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 130 S. Ct. at 2562 (emphasis added; quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418

(2005)); *see also Irwin*, 498 U.S. at 96 (noting that courts apply equitable tolling "only sparingly," in situations such as "where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass.").

Not every statutory time limit, however, is subject to these background rules. Where—as in the Exchange Act—statutory text, structure, or history indicates that a particular time limit cannot be extended, these rules do not apply. Indeed, *Lampf* squarely rejected the suggestion that the outer limit of the Exchange Act's dual-structure provisions was subject to equitable tolling. *See* 501 U.S. at 363 ("[T]he 3-year limit is a period of repose inconsistent with tolling.").

And *Lampf* is merely one of many cases in which this Court has emphasized that courts must exercise caution before invoking background rules to extend statutory time limits. Indeed, in *TRW*, this Court unanimously rejected the Ninth Circuit's premise that "*all* federal statutes of limitations, *regardless of context*, incorporate a general discovery rule 'unless Congress has *expressly* legislated otherwise.'" 534 U.S. at 27 (emphasis added; quoting *Andrews v. TRW, Inc.*, 225 F.3d 1063, 1067 (9th Cir. 2000)). Looking to "the text and structure" of the particular time limit at issue there, this Court concluded that Congress intended "to preclude judicial implication" of a more forgiving time limit. *Id.* at 28; *see also Beggerly*, 524 U.S. at 48 (refusing, in light of statutory text and structure, to resort to background rules to extend statutory time limit); *Brockamp*, 519 U.S. at 350-52 (same).

* * *

Because Section 16(b) specifies the date on which its two-year time limit begins to run—"the date such [short swing] profit was realized," 15 U.S.C. § 78p(b)—and that two-year time limit establishes a period of repose that cannot be extended, it follows that these actions are untimely. There is no dispute that all of the short-swing profits alleged in these lawsuits were realized no later than 2001. *See, e.g.*, JA 61, 63. Because respondent filed these lawsuits more than two years after the alleged "profit was realized," 15 U.S.C. § 78p(b), the district court correctly dismissed the lawsuits as untimely, and the Ninth Circuit erred by reversing that dismissal. Accordingly, this Court should reverse the Ninth Circuit's judgment.

II. These Actions Are Untimely Even If Section 16(b)'s Two-Year Time Limit Could Be Extended.

The lower courts that have departed from the repose approach described above have failed to develop a consistent alternative approach as to when, and to what extent, it is appropriate to extend Section 16(b)'s two-year time limit. In particular, the Ninth Circuit has adopted an unyielding "disclosure" approach whereby the time limit does not begin to run as a matter of law unless and until the defendant files a Section 16(a) disclosure form, regardless of whether or when a reasonably diligent securities owner knew or should have known the facts underlying a Section 16(b) action. *See, e.g.*, *Whittaker*, 639 F.2d at 527-30; Pet. App. 63-64a. The

Second Circuit, in contrast, has embraced a "notice" approach whereby "tolling is triggered by noncompliance with the disclosure requirements of Section 16(a)," and continues "until the claimant or (depending on the circumstances) the [issuer] company gets *actual* notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing." *Litzler*, 362 F.3d at 208 (emphasis added).

These divergent approaches, by themselves, underscore the wisdom of the straightforward repose approach described above. Once a court strays from the statutory text, it necessarily embarks on an uncertain path. Such uncertainty is particularly undesirable in the context of a statute, like Section 16(b), that Congress sought to make "capable of easy administration." *Reliance Elec.*, 404 U.S. at 422 (internal quotation omitted). But even assuming that this Court were inclined to venture onto that path, it should not follow either the Ninth or Second Circuit approaches.

A. The Ninth Circuit's "Tolling" Rule Should Not Be Adopted.

The Ninth Circuit based its conclusion that Section 16(b)'s two-year time limit may be extended primarily on what the court described as Section 16's overall "purpose": "to curb insider trading abuses." *Whittaker*, 639 F.2d at 528. According to the Ninth Circuit, "this purpose would be thwarted if insiders could escape liability by not reporting as required under § 16(a)." *Id.* Thus, the Ninth Circuit concluded, Section 16(b)'s two-year time limit "begins to run" only when the defendant files a disclosure form under Section 16(a), *regardless* of the plaintiff's knowledge. *Whittaker*, 639 F.2d at 530; Pet. App. 63a.[5]

The Ninth Circuit thereby employed a fundamentally misguided approach to statutory interpretation. "Vague notions of a statute's 'basic purpose' are ... inadequate to overcome the words of its text." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). If Congress had wanted Section 16(b)'s two-year time limit to start running on the date the defendant filed a Section 16(a) disclosure form, it could and would have said so. In fact, Congress considered, but did not adopt, a proposal to link the time limit in Section 16(b) to the disclosure required by Section 16(a). *See supra* Part 1.C. Instead,

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[5] Although the Ninth Circuit purported to apply the doctrine of "equitable tolling," *Whittaker*, 639 F.2d at 527, the court actually appears to have applied an accrual rule, not a tolling rule. As noted above, the Ninth Circuit fixed the date on which the two-year time limit "begins to run," *id.* at 530, which is an accrual concept, not a tolling concept. *See, e.g.*, *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (*per curiam*) (distinguishing accrual from tolling); *Cada*, 920 F.2d at 450 (distinguishing accrual from tolling, and noting that "[a]ccrual is the date on which the statute of limitations begins to run," while "[t]olling doctrines stop the statute of limitations from running even if the accrual date has passed."); *see also SEC v. Gabelli*, No. 10-3581, __ F.3d __, 2011 WL 3250556, at *7-8 (2d Cir. Aug. 1, 2011) (distinguishing discovery accrual rule from equitable tolling). The Ninth Circuit's accrual rule—which is based on the defendant's *disclosure* of certain facts, not the plaintiff's *discovery* of those facts—bears no resemblance to the traditional discovery accrual rule, which applies """where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part."""' *Merck*, 130 S. Ct. at 1794 (quoting *Holmberg*, 327 U.S. at 397, in turn quoting *Bailey*, 88 U.S. (21 Wall.) at 348).

Congress chose to link the time limit to "the date such [short-swing] profit was realized." 15 U.S.C. § 78p(b). The Ninth Circuit's "equitable tolling" rule is thus nothing more than a revision of the statute to alter the trigger date for the two-year time limit. "To attempt to decide whether some date other than the one set out in the statute is the date actually 'intended' by Congress is to set sail on an aimless journey." *United States v. Locke*, 471 U.S. 84, 93 (1985).

The Ninth Circuit further held that its "tolling" rule was justified by "the complementary nature of § 16(a) and § 16(b)." *Whittaker*, 639 F.2d at 528. In particular, the court declared, "[t]he disclosures and reports of § 16(a) are an *integral part* of the context of § 16 within which § 16(b) must be read." *Id.* (emphasis added). But these points are nothing more than reasons why Congress might have chosen to link the time limit for bringing a Section 16(b) action to the filing of a Section 16(a) disclosure form. As noted above, Congress did not make that choice.

To the contrary, Congress chose other means to ensure compliance with Section 16(a)'s disclosure requirements. It gave the Government (through the SEC and the Department of Justice) exclusive authority to enforce those requirements. *See, e.g.*, *Scientex Corp. v. Kay*, 689 F.2d 879, 882-83 (9th Cir. 1982) (no private right of action to enforce Section 16(a)). And Congress gave the Government a variety of enforcement tools, including authority to pursue injunctive relief, a bar on service as a director or officer, civil monetary penalties, *see* Exchange Act § 21(d)(1), (2), (3), 15 U.S.C. §§ 78u(d)(1), (2), (3), and even criminal sanctions, *see* Exchange Act § 32(a), 15

U.S.C. § 78ff(a); *see also* Exchange Act § 21(d)(5), 15 U.S.C. § 78u(d)(5) ("In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, ***any equitable relief*** that may be appropriate or necessary for the benefit of investors.") (emphasis added); *SEC v. DiBella*, 409 F. Supp. 2d 122, 130 (D. Conn. 2006) ("any equitable relief" under this provision includes disgorgement). Given these other means for enforcing the disclosures required by Section 16(a), there is no reason to toll the time limit for filing an action under Section 16(b) until a defendant files a Section 16(a) disclosure form. *See, e.g.*, *Carr*, 125 F. Supp. at 431-32; *cf. Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981) (rejecting implication of private enforcement mechanism where Congress expressly created public enforcement mechanism); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16 (1979) (same).

Nor can the Ninth Circuit's "tolling" rule be justified on the ground that "individual security holders" are unlikely to know about short-swing profits subject to disgorgement under Section 16(b) in the absence of a disclosure form under Section 16(a). *Whittaker*, 639 F.2d at 528. The Ninth Circuit, after all, expressly *rejected* a tolling rule based on the plaintiff's knowledge in favor of a tolling rule based solely on the defendant's filing of a disclosure form, so that Section 16(b)'s time limit is tolled *regardless of* the plaintiff's knowledge. *See id.* at 528-30; Pet. App. 63a. The Ninth Circuit identified no authority to justify the continued operation of equitable tolling even past the point at which a reasonably diligent plaintiff knew or should have known the facts underlying a claim. That was no oversight, because no such authority exists. To the contrary, as the district court noted, it would be *inequitable* to extend a statutory time limit for filing an action past the point at which a reasonably diligent plaintiff knew or should have known the facts underlying that action. Pet. App. 108a, 110a.

The Ninth Circuit's novel "tolling" rule also would create a glaring anomaly in the operation of the Exchange Act. As noted above, other provisions of that Act targeting fraud and intentional wrongdoing require plaintiffs to sue within a fixed period of time after discovering the wrongdoing. *See Merck*, 130 S. Ct. at 1797; *Lampf*, 501 U.S. at 359-64. Congress would not have crafted a securities-law regime in which a plaintiff must file suit within a fixed time after discovering a fraud, but may sit on his hands for years before filing suit after discovering a violation of a strict-liability provision.

Finally, the Ninth Circuit's novel "tolling" rule implicitly assumes that a Section 16(b) defendant was required to file a Section 16(a) disclosure form in the first place. As these lawsuits underscore, that assumption is not always warranted: petitioners have not filed Section 16(a) disclosures because they believe that they are not required to do so. As underwriters, petitioners are generally *exempt* from both disclosure under Section 16(a) and disgorgement under Section 16(b). *See* 17 C.F.R. § 240.16a-7(a) (creating underwriter exemption to Section 16(a)); *see also* 17 C.F.R. § 240.16a-10 (extending underwriter exemption to Section 16(b));

see generally 15 U.S.C. § 78p(b) (authorizing SEC to create exemptions).

To be sure, that exemption applies only to "good faith" underwriting, *see* 17 C.F.R. § 240.16a-7(a), a term that the SEC has never authoritatively construed. Although the most natural reading of that term is that the underwriter exemption applies to all *bona fide* distributions of shares to the public, respondent advanced a far more expansive view of the "good faith" exception to the underwriter exemption. Thus, respondent attempted to "plead around" the underwriter exemption by alleging that petitioners "lacked good faith in connection with their IPO underwriting and distribution activities" at issue in each lawsuit because of the underlying misconduct alleged. *See, e.g.*, JA 58-59.

Because the time limit is a threshold issue, no court has yet resolved respondent's challenge to the applicability of the underwriter exemption. If petitioners must prove that they are covered by the underwriter exemption to invoke the statutory time limit, that limit would be effectively meaningless, because petitioners would have established that they are entitled to prevail on the merits.

As a practical matter, thus, the Ninth Circuit's "tolling" rule yields the perverse result that the *more* far-fetched a plaintiff's theory of Section 16 liability, the *less* likely a defendant will be entitled to invoke the benefit of the statutory time limit. Section 16(b) defendants, like petitioners, who have no reason to believe they are required to file Section 16(a) disclosure forms are effectively disabled from invoking the two-year time limit. *See* Pet. App. 109-10a ("[T]he novelty of [respondent's] theory neither gives [petitioners] sufficient notice of the possibility of having to file a Form 4 (*i.e.*, the underwriters should have known that allocating IPO shares to their best customers in return for more business could lead to Section 16(b) liability) nor does it provide any end date of liability for the issuing companies or the underwriters."); Pet. App. 110a n.15 ("Until such time as [petitioners] file a Form 4—essentially admitting liability—the statute is tolled forever.").[6] "Indeed," as the district court noted, "[respondent's] counsel acknowledged that under her theory she could buy stocks in companies who had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock." Pet. App. 110a. The district court correctly perceived that "permitting shareholders to go back 20 years with novel claims for Section 16(b) liability" was consistent neither with the statute nor with any known form of equitable tolling. *Id.*

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[6] It is no answer to assert, as respondent does, that a potential Section 16(b) defendant subject to an exemption could always file a prophylactic Section 16(a) disclosure out of an abundance of caution, without admitting liability under Section 16(b). *See* Pet. Opp. 19 n.7. Putting aside the fact that such a regime would essentially undo the exemption, and drown the SEC in useless filings, a potential Section 16(b) defendant could not possibly anticipate all of the various ways in which it might be alleged that he falls within the scope of the statute. Thus, even if a potential Section 16(b) defendant were inclined to file prophylactic Section 16(a) disclosures, a plaintiff could still "plead around" such disclosures by simply devising new and ever more fanciful theories of liability.

B. The Second Circuit's Tolling Rule Also Should Not Be Adopted.

Unlike the Ninth Circuit, the Second Circuit recognized that the two-year time limit for filing a Section 16(b) action starts to run on the date Congress said it starts to run—"the date such [short-swing] profit was realized," 15 U.S.C. § 78p(b). *See Litzler*, 362 F.3d at 206-07; *Tristar Corp. v. Freitas*, 84 F.3d 550, 553 (2d Cir. 1996). The Second Circuit, however, also invoked the doctrine of equitable tolling to extend that time limit. *See Litzler*, 361 F.3d at 207; *Tristar*, 84 F.3d at 553 (citing *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 264 (2d Cir. 1990)).

Even assuming *arguendo*—notwithstanding Section I of this brief—that it was appropriate for the Second Circuit to invoke the doctrine of equitable tolling to extend the two-year time limit in Section 16(b), the court did not correctly describe or apply that doctrine. Rather, the Second Circuit departed in material ways from established principles.

As noted above, the traditional rule is that a plaintiff may obtain the benefit of equitable tolling "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 130 S. Ct. at 2562 (quoting *Pace*, 544 U.S. at 418). The doctrine requires a fact-specific inquiry that '"must be made on a case-by-case basis."' *Holland*, 130 S. Ct. at 2562 (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)). Under no circumstances is equitable tolling available where, on the specific facts of a case, the plaintiff failed to exercise reasonable diligence. *See id.* at

2562-63; *Lawrence v. Florida*, 549 U.S. 327, 336-37 (2007); *Pace*, 544 U.S. at 418-19; *Irwin*, 498 U.S. at 96; *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151 (1984) (*per curiam*).

The Second Circuit did not purport to apply this traditional rule, but instead fashioned its own equitable tolling doctrine uniquely applicable to Section 16(b). *See Litzler*, 362 F.3d at 207-08. According to the Second Circuit, "the incentives of Section 16 are best served if tolling is triggered by noncompliance with the disclosure requirements of Section 16(a) through failure to file a Form 4," and "[s]uch tolling should continue ... until the claimant or (depending on the circumstances) the company gets *actual* notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing." *Id.* at 208 (emphasis added). In the Second Circuit's view, "[t]he prophylaxis of Section 16 ... would be impaired if the tolling triggered by non-compliance was ended or defeated by mere inquiry notice, or by circumstances in which a person would or should have realized the non-compliance, or by the ability of a shareholder or company to piece together the substance of a Form 4 from disparate sources of information." *Id.*

Given that the very premise underlying the application of a background rule is that Congress is presumed to legislate against the backdrop of such a rule, the Second Circuit had no license to craft this unique equitable tolling doctrine for Section 16(b). Congress obviously does not legislate against the backdrop of rules that courts develop on an *ad hoc, post hoc* basis. *See, e.g.*, *Meyer v. Holley*, 537 U.S. 280, 286 (2003) ("Congress' silence, while permitting an inference that Congress intended to apply *ordinary* background tort principles, cannot show that it intended to apply an unusual modification of those rules.") (emphasis in original).

In particular, the Second Circuit erred by holding that an alleged failure to file a Section 16(a) disclosure form necessarily triggers equitable tolling under Section 16(b). *See Litzler*, 362 F.3d at 208. Judge Jacobs, the author of the Second Circuit's opinion, disagreed with the court on this score, noting in a footnote that he "would have preferred to say" that the two-year time limit in Section 16(b) "is equitably tolled only when the failure to file is intentional or unreasonable." *Id.* at 208 n.5. "This rule," Judge Jacobs stated, "would be consistent with the general principle that a federal statute of limitations may be equitably tolled when fraudulent or other conduct conceals the existence of a claim." *Id.* (internal quotations omitted). Judge Jacobs warned that "[o]ne possible effect of our holding in this case is that a claim that affects long-settled transactions might hang forever over honest persons." *Id.*

The Second Circuit also erred by drawing a distinction in the Section 16(b) context between actual and constructive knowledge, and holding that equitable tolling would continue "until the claimant or (depending on the circumstances) the company gets *actual* notice" of the facts underlying a Section 16(b) claim. *Id.* at 208 (emphasis added). The court identified no authority for the proposition that equitable tolling continues until a plaintiff has *actual* notice of the facts underlying a claim. To the contrary, the court acknowledged that "[o]rdinarily, inquiry notice is sufficient to defeat or end equitable tolling." *Id.* at 207 (citing cases); *see also Staehr v. The Hartford Fin. Servs. Group, Inc.*, 547 F.3d 406, 426 (2d Cir. 2008) ("Equitable tolling will stay the running of the statute of limitations only so long as the plaintiff has exercised reasonable care and diligence in seeking to learn the facts which would disclose fraud.") (internal quotation omitted); *Cantor v. Perelman*, 414 F.3d 430, 440 (3d Cir. 2005) (information that put plaintiffs "at least on inquiry notice ... forecloses equitable tolling ... as a matter of law").[7]

C. No Background Rule Would Render These Lawsuits Timely.

Under a proper application of the relevant background rules, even assuming *arguendo* they applied here in the first place, these lawsuits still would be untimely. As the Second Circuit correctly perceived, the discovery accrual rule has no bearing in the context of Section 16(b), because that provision specifies the date on which the two-year time limit begins to run—"the date such [short-swing] profit was realized," 15 U.S.C. § 78p(b). As noted above, a background rule obviously cannot trump a statute's plain language. Moreover, this Court has made clear that the discovery accrual rule is generally limited to fraud claims. *See, e.g.*, *Merck*, 130 S. Ct. at 1793-94; *TRW*, 534 U.S. at 27-28.

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[7] Although petitioners believe that the Second Circuit in *Litzler* misapplied equitable tolling principles, petitioners would prevail here even under the *Litzler* approach. As the district court noted, the factual allegations underlying respondent's complaints are drawn almost verbatim from the allegations made against petitioners and the issuing corporations in the *IPO* litigation brought in 2001. *See* Pet. App. 83a, 85a, 107-08a. Because the issuing corporations were defendants in the *IPO* litigation, they obviously had "actual notice" of those allegations. *Litzler*, 362 F.3d at 208.

Nor does the equitable tolling doctrine save these lawsuits because (as the district court noted), "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a; *see also id.* at 108a ("The only significant development occurring within the last two years was [respondent's] acquisition of the shares in these companies. All other facts relied upon in these cases were known to the shareholders over five years before these complaints were filed.").

The district court correctly focused on the knowledge of a reasonably diligent plaintiff, not respondent's actual knowledge. As noted above, equity demands reasonable diligence, assessed by what a plaintiff knew or *should have known*. *See, e.g.*, *Merck*, 130 S. Ct. at 1793-94. Thus, a Section 16(b) plaintiff is not entitled to the benefit of equitable tolling if she *should have known* certain facts, regardless of whether she *actually knew* those facts. Were the law otherwise, the two-year time limit would be meaningless, because (as respondent's counsel conceded below) an attorney could always "go out and find a plaintiff that was not on notice." Pet. App. 110a n.15.[8]

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[8] The knowledge issue is complicated somewhat by the fact that a Section 16(b) action may be brought either by a securities issuer or (after adequate demand on the issuer) by an owner of

(cont'd ...)

The district court also correctly focused on a reasonably diligent shareholder's knowledge of "the *facts* giving rise to [respondent's] complaints against [petitioners]." Pet. App. 107a (emphasis added). A plaintiff who fails to sue even after the point at which he knew or should have known the facts underlying his claim cannot possibly establish "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland*, 130 S. Ct. at 2562 (internal quotation omitted).

Respondent cannot switch course now, and "dispute that all of the facts giving rise to [her] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a. These complaints are based on the very same facts at issue in the high-profile *IPO* litigation. *See* Pet. App. 85a ("[Respondent] filed her complaints for short-swing transactions based on the same set of facts as presented in *In re IPO*, albeit under a new

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the issuer's securities on the issuer's behalf. *See* 15 U.S.C. § 78p(b). Because the statute does not link the operation of its two-year time limit to anyone's knowledge, the statute does not specify *whose* knowledge matters when an action is brought on the corporation's behalf. Notwithstanding *Litzler*, the general background rule in American corporate law is that, in assessing the timeliness of a derivative action on a corporation's behalf, what matters is the knowledge of a reasonably diligent shareholder, not the corporation's knowledge. *See, e.g.*, *In re Tyson Foods, Inc.*, 919 A.2d 563, 585 (Del. Ch. 2007); *Kahn v. Seaboard Corp.*, 625 A.2d 269, 276 (Del. Ch. 1993); *see generally* R. Franklin Balloti & Jesse A. Finkelstein, *Delaware Law of Corporations & Business Organizations* § 13.9, at 13-20 (3d ed. supp. 2011).

theory of liability and almost six years later."); *cf. Miles*, 471 F.3d at 43 (describing widespread publicity of alleged IPO abuses by underwriters). In her complaints, respondent simply superimposed the legal framework of Section 16(b) liability onto these facts: she alleged that the underwriters qualified as statutory insiders, and that the transactions related to the disputed IPOs amounted to short-swing purchases and sales from which petitioners profited. *See* JA 58-62. Dressing up these underlying facts in Section 16(b) garb required nothing more than a creative lawyer. Indeed, respondent can hardly claim that she lacked sufficient facts to bring these Section 16(b) actions absent Section 16(a) disclosures, given that she actually *did* bring these Section 16(b) actions absent Section 16(a) disclosures. Thus, even if this Court were to adopt a "notice" approach, no remand would be necessary.

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At the end of the day, these lawsuits are untimely regardless of whether Section 16(b)'s two-year time limit is construed as a statute of repose not subject to equitable tolling or as a statute of limitations subject to equitable tolling. Accordingly, the district court correctly dismissed these claims as time-barred, and the Ninth Circuit erred by reversing the district court's judgment on this score.

CONCLUSION

For the foregoing reasons, this Court should reverse the Ninth Circuit's judgment.

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RESPONDENT'S BRIEF

No. 10-1261

In the
Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,
Petitioners,

v.

VANESSA SIMMONDS,
Respondent.

IN RE SECTION 16(b) LITIGATION

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the two-year time limit for bringing a lawsuit under Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), is tolled when the defendant has failed to comply with the disclosure requirements of Section 16(a), 15 U.S.C. § 78p(a).

LIST OF PARTIES

Pursuant to Rules 24.1(b) and 24.2, below is a list of all parties to the proceedings in the court whose judgment is under review:

Plaintiff/Respondent

1. Vanessa Simmonds

Defendants/Petitioners ("Underwriters")

1. Credit Suisse Securities (USA) LLC
2. Goldman Sachs & Co.
3. J.P. Morgan Securities Inc.
4. Merrill Lynch, Pierce, Fenner & Smith Incorporated
5. Bank of America Corporation
6. Robertson Stephens, Inc.
7. Deutsche Bank Securities Inc.
8. Morgan Stanley & Co. Incorporated
9. Citigroup Global Markets, Inc.
10. Bear, Stearns & Co., Inc.
11. Lehman Brothers Inc.

Nominal Parties Issuers

1. Onvia, Inc.
2. Finisar Corporation
3. Ariba, Inc.
4. Akamai Technologies, Inc.
5. Intersil Corporation
6. Avici Systems, Inc.
7. Tivo, Inc.
8. Selectica, Inc.
9. Red Hat, Inc.
10. Vignette Corporation
11. Sycamore Networks, Inc.
12. Silicon Laboratories Inc.

13. Maxygen, Inc.
14. The Street.com, Inc.
15. Sonus Networks, Inc.
16. Priceline.com Incorporated
17. Martha Stewart Living Omnimedia, Inc.
18. Audible, Inc.
19. Capstone Turbine Corporation
20. CoSine Communications, Inc.
21. Perot Systems Corporation
22. AsiaInfo Holdings, Inc.
23. Saba Software, Inc.
24. Digimarc Corporation
25. InterNAP Network Services Corporation
26. Packeteer Inc.
27. Aspect Medical Systems, Inc.
28. NaviSite, Inc.
29. Oplink Communications, Inc.
30. Occam Networks, Inc.
31. Foundry Networks, Inc.
32. Avanex Corporation
33. Turnstone Systems, Inc.
34. Silicon Image, Inc.
35. Juniper Networks
36. Kana Software, Inc.
37. Interwoven, Inc.
38. Openwave Systems, Inc.
39. Informatica Corporation
40. Critical Path, Inc.
41. SourceForge, Inc.
42. Concur Technologies, Inc.
43. Palm, Inc.
44. Brocade Communications Systems, Inc.
45. Microtune, Inc.
46. Extreme Networks, Inc.
47. InsWeb Corporation
48. Marvell Technology Group Ltd.

49. Keynote Systems, Inc.
50. Tibco Software Inc.
51. Transmeta Corporation
52. Airspan Networks, Inc.
53. OmniVision Technologies, Inc.
54. Immersion Corporation

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STATUTORY PROVISION INVOLVED

Section 16 of the Securities Exchange Act of 1934
15 U.S.C. § 78p(a), (b)

Section 16. Directors, officers, and principal stockholders

(a) Disclosures required

(1) Directors, officers, and principal stockholders required to file

Every person who is directly or indirectly the ***beneficial owner of more than 10 percent of any class of any equity security*** . . . or who is a ***director*** or an ***officer*** of the issuer of such security, ***shall*** file the statements required by this subsection with the Commission.

* * *

(b) Profits from purchase and sale of security within six months

For the purpose of preventing the unfair use of information which may have been obtained by ***such beneficial owner, director, or officer*** by reason of his relationship to the issuer, ***any profit realized by him*** from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . or a security-based swap agreement . . . involving any such equity security within any period of less than six months . . . ***shall inure to and be***

> ***recoverable by the issuer***, irrespective of any intention on the part of ***such beneficial owner, director, or officer*** in entering into such transaction . . . . Suit to recover ***such profit*** may be instituted at law or in equity in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter; ***but no such suit shall be brought more than two years after the date such profit was realized***.

(Emphasis added).

STATEMENT OF THE CASE

I. BACKGROUND ON SECTION 16

A. Congress Sought to Curb the Evils of Insider Trading and Protect the Integrity of United States Financial Markets Through Exclusive Private Enforcement of Section 16(b).

Congress enacted Section 16(b) of the Securities Exchange Act of 1934 ("1934 Act") "to curb the evils of insider trading." *Reliance Elec. Co. v. Emerson Elec. Co.*, 404 U.S. 418, 422 (1972). The statute "imposes a strict prophylactic rule with respect to [statutory] insider, short-swing trading." *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251 (1976). Statutory insiders include officers, directors, and shareholders with more than a 10 percent interest in the issuing company. 15 U.S.C. § 78p(b). The latter may be formed by a group that collectively owns more than 10 percent of an issuer's securities. *Roth v. Jennings*, 489 F.3d 499, 507-08 (2d Cir. 2007) (summarizing statutory and regulatory basis for group status). With group status, each member is a statutory insider individually subject to both Sections 16(a) and (b). *Id.* (citing 17 C.F.R. § 240.13d-5(b)(1)). Group status becomes an element of a Section 16(b) case where, as here, "group" is necessary for a member, such as an underwriter, to be deemed a Section 16 statutory insider.

The underlying right afforded by Section 16(b) is an issuer's entitlement to insiders' short-swing profits. Insiders are "presumed to have access to inside information." *Foremost-McKesson*, 423 U.S. at 243. They must disgorge their profits to the issuer when they profit from trades in publicly-traded issuer shares within any six-month period ("short-swing trading"). 15 U.S.C. § 78p(b); *Kern County Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973); *Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001).

Congress did not give the Securities and Exchange Commission ("SEC") any role in enforcing Section 16(b). *Gollust v. Mendell*, 501 U.S. 115, 122 (1991). Congress permitted only private enforcement and relies on attorneys to spearhead that effort:

> Congress left enforcement of section 16(b) cases to shareholders and consequently to the attorneys who find such cases and represent the shareholders who consent to be plaintiffs. The SEC was given no role in enforcing section 16(b). Thus, section 16(b) can be enforced and

> the market's integrity can be protected, only if attorneys are willing to invest the time and energy, and assume the risk, that is involved in investigating numerous SEC filings in the search to uncover insiders who make improper short swing profits, and filing lawsuits against those unwilling to return such profits.

Klein v. Salvi, No. 02 Civ. 1862 (AKH), 2004 WL 596109, at *10 (S.D.N.Y. Mar. 30, 2004), *aff'd*, 2004 WL 2931121 (2d Cir. 2004); *see also Pellegrino v. Nesbit*, 203 F.2d 463, 466 (9th Cir. 1953) (Section 16(b) plaintiff "is merely an instrument for effectuating the statutory policy"); Peter Romeo & Alan Dye, *Section 16* § 9.02[3] (2008) ("plaintiff's attorneys are the protagonists" in most Section 16(b) cases; "their activities are critical to the success of the provision.").

B. Section 16(b) Enforcement Requires Section 16(a) Disclosure.

Section 16(a) is integral to Section 16(b) enforcement. Section 16(a) requires insiders to publicly disclose their securities transactions. 15 U.S.C. § 78p(a). That disclosure enables Section 16(b) enforcement. As described by the SEC:

> Section 16 . . . was designed to provide the public with information on insider securities transactions and holdings and to deter insiders from profiting on short term trading transactions in the securities of their corporations on the basis of undisclosed information. The section was enacted primarily in response to abuses, described in detail in the legislative history of the Exchange Act, where

> insiders with advance knowledge of facts which would produce a rise or fall in the market value of securities of their companies bought and sold such securities as the circumstances warranted to their personal advantage. On occasion, insiders actually manipulated the market price of their stock by causing a corporation to follow financial policies calculated to produce sudden changes in market prices in order to obtain short swing profits. To combat these practices, Congress enacted Section 16 to require reports of securities transactions by insiders [Section 16(a)] and to provide for the recovery of any short swing profits [Section 16(b)].

Interpretive Release on Rules Applicable to Insider Reporting and Trading, Release No. 34-18114, 46 Fed. Reg. 48147-01, at 48147 (Oct. 1, 1981) [hereinafter "SEC Interpretative Release"] (footnotes omitted); *see also infra* at 20-21, 24-26 (detailing relationship between Section 16(a) disclosure and Section 16(b) liability).

The "reports" to which the SEC refers are commonly known as "Section 16(a) reports." They "are an integral part of the context of § 16 within which § 16(b) must be read." *Whittaker v. Whittaker Corp.*, 639 F.2d 516, 528 (9th Cir. 1981). The reports provide the "main source of information for suits Congress has empowered [shareholders] to bring" under Section 16(b). *Id.*; *Litzler v. CC Invs., L.D.C.*, 362 F.3d 203, 207 (2d Cir. 2004) ("The prophylaxis of Section 16 works by imposing an 'absolute duty' of disclosure." (quoting *Grossman v. Young*, 72 F. Supp. 375, 378 (S.D.N.Y. 1947))).

Section 16(a) requires statutory insiders to disclose:

- The reporting person's identity.
- Whether the reporting person is an officer, director, or 10 percent shareholder.
- Whether the reporting person is filing individually or as part of a "group."
- The dates of the transactions.
- The amounts, prices, and nature of the securities bought or sold.

15 U.S.C. § 78p(a); Resp. App. 1b (blank Section 16(a) report). Section 16(a) reports allow the examining shareholder to determine whether any purchases and sales, or sales and purchases, have occurred within periods of less than six months, and, if so, mathematically compute the short-swing profits to be disgorged; identify the statutory insiders as individuals or groups; and pinpoint the shares in which the insiders have or share "a direct or indirect pecuniary interest." 17 C.F.R. § 240.16a-1(a)(2). Without Section 16(a) reports, shareholders have no access to the short-swing profit and other claim-related information they need to enforce Section 16(b) as Congress envisioned.

II. STATEMENT OF FACTS

A. Plaintiff's Claim

From 1998 through 2000, the stock market experienced a surge of "hot" initial public offerings

("IPOs"). Shares in these IPOs immediately traded at a premium in the aftermarket. Petitioners ("Underwriters") served as lead underwriters for most "hot" IPOs during the dot-com era, including those of the nominal-party issuers ("Issuers"), and reaped extraordinary profits—risk-free—through short-swing trades in Issuer IPO shares. JA 57-62. SEC-approved governing body rules require underwriters to make a complete distribution of IPO shares at the IPO price. 15 U.S.C. § 78s(b); National Association of Securities Dealers, Inc. ("NASD") Conduct Rules 2110, 2330(f), *available at* http://www.sec.gov/pdf/nasd1/2000ser.pdf. Underwriters are prohibited from deriving financial gain from increases in aftermarket prices of hot IPO shares. *Id.* They cannot allocate shares to themselves, and shares allocated after trading commences at a higher price still must be distributed at the IPO price. *Id.*; *see also* JA 58-60.

Underwriters distributed IPO shares to the market and controlled who received hot IPO allocations. In doing so, they distributed what were essentially instant, risk-free profits. For example, an investor receiving an IPO allocation of Issuer SourceForge, Inc. shares (formerly VA Linux) at its IPO price of $30 per share on the morning of December 9, 1999, realized a ten-fold profit when VA Linux shares opened for public trading later that morning at $299 per share. Excerpts of Record (9th Cir.) 179, 182.

Underwriters devised a scheme to share in these profits. JA 57-62. They allocated shares in hot IPOs to select customers who agreed to immediately sell the shares at significantly higher aftermarket prices and kick back a large percentage of the profits to Underwriters. *Id.* Underwriters disguised their profit-sharing arrangements—by putting shares in customer accounts rather than their own—because such arrangements are prohibited. JA 58; NASD Conduct Rule 2330(f). In a complaint filed against Petitioner Credit Suisse First Boston ("CSFB"), the SEC explained:

> In exchange for shares in "hot" IPOs, CSFB wrongfully extracted from certain customers a large portion of the profits those customers made by flipping their IPO stock. From at least April 1999 through June 2000, CSFB employees allocated shares of IPOs to over 100 customers who were willing to funnel between 33 and 65 percent of their profits to CSFB. The profits were channeled to CSFB in the form of excess brokerage commissions generated by the customers in unrelated securities trades that the customers generally affected solely to satisfy CSFB's demands for a share of the IPO profits.

JA 141-142.

Underwriters also engaged in "laddering" to increase the profit potential of hot IPOs. JA 58. They required IPO allocation recipients to "ratchet up" the aftermarket stock price by buying additional shares at progressively higher prices. *Id.* This conduct also is prohibited. 17 C.F.R. § 242.101(a). It manipulated the market by giving Underwriters the ultimate informational advantage of knowing the price at which issuer shares would later trade.

Underpricing was a key component of Underwriters' risk-free profit scheme. Academics refer to underpricing as "money left on the table"—money issuers could have raised in an IPO. JA 67. The 54 IPOs at issue generated over $7 billion in proceeds for Issuers, but left over $15 billion "on the table." This makes them among the most egregious examples of underpricing. *See generally* Jay Ritter, *Money Left on the Table in IPOs by Firm* (Mar. 19, 2008), *available at* http://bear.warrington.ufl.edu/ritter/moneyonthetablebyfirm.pdf.

Over the course of several years, evidence of a counter-intuitive fact began to emerge as more details of the underpricing phenomenon unique to the dot-com period were uncovered. IPO underpricing was a scheme not limited to Underwriters. It was a coordinated group effort that included key Issuer decision-makers. Top-level executive insiders of Issuers were involved in, and profited from, underpricing. They put their own financial interests ahead of those of the companies to which they owed fiduciary duties of loyalty and deliberately underpriced their companies' IPOs to facilitate and participate in Underwriters' risk-free profit scheme.[1] *Cf.* Donald

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[1] Issuer decision-makers' profit motives were substantial. For example, CEO Jerry Rawls described Finisar's IPO as "really successful" despite leaving hundreds of millions of dollars on the table. JA 172. The Merrill Lynch-led IPO was priced at $19 per share. JA 175. On the first day of trading, those shares traded as high as $108. JA 184. Fewer than 30 days later, with Finisar shares trading over $100, Merrill Lynch issued an analyst report stating the shares were ***undervalued***. JA 185-188. Five months after the IPO, Finisar issued a secondary offering in which Merrill Lynch released the lock-ups and allowed Rawls, his family, and affiliates to sell $188 million of their shares at $100 per share. JA 189-195. Finisar insiders collectively sold $570 million of stock. *Id.* What was not known then, although known now, is that these

Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 407 (1953) (Section 16(b) "is designed to remove all temptation to faithlessness."). The phenomenon of intentionally underpricing IPOs has generated a tremendous amount of recent scholarship, essentially all of which supports the thesis underlying Plaintiff's Section 16(b) claim. *See generally* J. Griffin et al., *Why are IPO Investors Net Buyers Through Lead Underwriters?*, 85 J. Fin. Econ. 518 (2007); Xiaoding Lui & Jay Ritter, *Corporate Executive Bribery: An Empirical Analysis* (Dec. 4, 2007), *available at* http://bear.warrington.ufl.edu/ritter/work_papers/BriberyDec42007.pdf.

Plaintiff's Section 16(b) cases address this only-recently-understood iteration of the intentional underpricing phenomenon. JA 59-62 (group conduct allegations). The IPO Litigation to which Underwriters refer and the SEC complaint noted above did not. The coordinated conduct among Issuer insiders and Underwriters to profit from underpricing IPO shares establishes them as Section 16 insiders—a group collectively owning more than 10 percent of an issuer's securities. *See Roth*, 489 F.3d at 507-08 (detailing group basis for Section 16(a) insider status).

B. Insiders' Undisputed Failure to Disclose Section 16(a) Information

None of the targeted insiders in these cases filed Section 16(a) reports. JA 62. Nor have they ever

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profits were not an accidental byproduct of Merrill Lynch's activities alone. It was a coordinated group effort.

publicly disclosed Section 16(a) information in any other manner.

Underwriters repeatedly claim Plaintiff should have known certain "facts" more than two years before these Section 16(b) suits were filed. Pet. Br. 2-3, 16, 42-44. However, Underwriters have yet to identify any Section 16(a) "facts" available anywhere in the public domain. Underwriters do not, and cannot, point to any evidence that the IPO or other litigation revealed the targeted insiders' short-swing trades, profits, group affiliations, and other information required to be disclosed in Section 16(a) reports.

C. Plaintiff's Discovery of Facts Establishing Underwriters' Insider Status

The group conduct among Underwriters and Issuer insiders that establishes them as Section 16 insiders was not revealed through prior litigation. Underwriters assert the IPO Litigation disclosed the facts underlying Plaintiff's Section 16(b) claims. Pet. Br. 41 n.7; Pet. 18. However, Underwriters never show how. They do not cite any document in the record, or otherwise, showing the IPO Litigation revealed the underpricing-based combination among Underwriters and key Issuer decision-makers—facts on which Plaintiff's Section 16(b) cases are specifically based. Nowhere in their three-page description of "The IPO Litigation" do Underwriters even allude to facts regarding group conduct. Pet. Br. 7-10. Nor do group facts appear in the SEC action against Credit Suisse. JA 141-169.

Instead, Underwriters simply repeat the district court's statement that "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. Br. 2, 3, 13, 16, 42, 43. That statement is factually inaccurate, made without any evidentiary hearing or discovery, in the context of a motion to dismiss. Underwriters and key Issuer decision-makers engaged in group conduct in furtherance of a common objective to reap risk-free profits from short-swing trades and an inflated aftermarket. JA 60-61. At best, circumstantial evidence of this group conduct was ascertainable by shareholders willing and able to undertake a thorough, independent investigation only in the period immediately before Plaintiff's suits were filed. Until these Section 16(b) cases, underpricing was widely viewed as a breach by underwriters acting alone. *See, e.g.*, *EBC I, Inc. v. Goldman Sachs & Co.*, 832 N.E.2d 26 (N.Y. App. 2005).

Plaintiff "piece[d] together" the framework of her group-based Section 16(b) claims by analyzing "disparate sources of information."[2] *Litzler*, 362 F.3d at 208. One source included academic literature. *See supra* at 9-10. The IPO underpricing phenomenon has drawn considerable academic attention over several decades. *Id.* In the 1980s and 1990s, scholars generally attributed the phenomenon to legitimate business justifications. *See, e.g.*, JA 66 ("The changing risk composition hypothesis, introduced by Ritter (1984), assumes that riskier IPOs will be underpriced by more than less-risky IPOs."). In 2004, Professors Loughran and Ritter introduced the "spinning hypothesis" to explain the anomalous increase in "money left on the table" during the dot-com era. JA 79-83. The spinning hypothesis is based on the conflicts of interest issuer decision-makers have when pricing decisions are influenced by side-payments from investment banks desirous of future business. JA 80.

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[2] This stands in stark contrast to how Congress designed Section 16 to operate. *See infra* at 24-26, 41-43. Section 16 compels disclosure through a Section 16(a) report "so clear that an insider's short-swing profits will be discovered without any investigation other than the putting together of two and two." *Litzler*, 362 F.3d at 208 (citation omitted). "The prophylaxis of Section 16 works by imposing an absolute duty of disclosure upon insiders." *Id.*

These academic articles hypothesized only generally what Plaintiff subsequently determined was coordinated group conduct among Underwriters and Issuer insiders. Although the coordinated conduct gives rise to the Section 16(b) violations on which Plaintiff's cases are based, the targeted insiders' actual short-swing trading details have never been disclosed through Section 16(a) reports or otherwise. They remain publicly unknown.

Financial economists have continued their quest to understand the IPO underpricing phenomenon as it relates to the IPOs in these cases—long after Plaintiff researched, investigated, and filed her Section 16(b) claims. In the May 2010 edition of Oxford University's *The Review of Financial Studies*, Professors Xiaoding Liu and Jay Ritter note their analysis of Issuer insiders' involvement in dot-com-era underpricing was delayed "***mainly due to the lack of data***." Xiaoding Lui & Jay Ritter, *The Economic Consequences of IPO Spinning*, 23 Rev. Fin. Stud. 2024, 2025 (2010) (emphasis added). Professors Liu and Ritter first published their conclusions in May 2009 and presented them in September 2009 at the Harvard Law School Forum on Corporate Governance and Financial Regulation. Their conclusions, based on "data gathered from court cases, the media, and documents requested through the Freedom of Information Act," *id.*, support the analytical framework of Plaintiff's Section 16(b) complaints.

None of the critical information regarding Underwriters' and Issuer insiders' coordinated scheme to underprice Issuer IPOs was part of the IPO Litigation or the SEC complaint against Credit Suisse. Yet these group facts were—and remain—an essential part of Plaintiff's claims.

III. PROCEDURAL HISTORY

Plaintiff filed 55 lawsuits in the United States District Court for the Western District of Washington in October 2007. JA 44 (lead complaint). Each alleged Section 16(b) violations stemming from the uniform, coordinated business practices employed by the Underwriters and Issuer insiders described above. JA 54-64. Plaintiff dismissed one case after the issuer was taken private. *See Gollust*, 501 U.S. at 125-26 (explaining Section 16(b) standing requirements). Underwriters filed a motion to dismiss that asserted the remaining 54 suits were time-barred under Section 16(b)'s two-year limitations period. JA 48. The district court granted the motion. JA 50.

The Ninth Circuit reversed. Pet. App. 61a-66a, 71a. Unlike the district court, the Ninth Circuit followed the "fundamental holding" of its long-standing, "thorough" *Whittaker* decision that Section 16(b)'s two-year time limit is tolled until the insider discloses its transactions in a Section 16(a) report. *Id.* 61a, 66a.

Underwriters timely filed a petition for certiorari, which this Court granted on June 27, 2011. JA 41, 42. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

SUMMARY OF ARGUMENT

This Court should affirm the Ninth Circuit's decision that Section 16(b)'s two-year time limit is tolled until the insider complies with Section 16(a) and reports its short-swing trading activity. Congress did not intend insiders' noncompliance with Section 16(a) to effectively preclude their Section 16(b) disgorgement liability. Otherwise, Congress' creation of the main Section 16(b) enforcement mechanism would be a nullity. Except for one early decision later renounced, every federal court to have addressed this issue during Section 16(b)'s 77-year history has reached the same conclusion.

This Court should do the same. Unlike other limitations provisions in the 1934 Act, Section 16(b)'s two-year time limit exemplifies a statute of limitations, not a statute of repose. The two-year limit restricts the remedy of a lawsuit to enforce the underlying right afforded by Section 16(b). However, it does not extinguish the underlying right itself. The statutory text and surrounding context confirm this. Whereas the other time limits in the 1934 Act express Congress' desire for absolute repose, the two-year time limit in Section 16 does not.

Section 16's uniqueness was no legislative accident. Congress considered adopting a repose approach for Section 16 as it did in other sections of the 1934 Act. It chose not to. Congress also has had numerous opportunities to amend Section 16 if it disagreed with the federal courts' widespread acceptance of Section 16 tolling. It chose not to. In fact, Congress endorsed these "judicial precedents" when amending Section 16 in 2000.

Underwriters' no-tolling construction contains a fundamental doctrinal mistake. Even if this Court were to construe Section 16(b)'s two-year time limit as a statute of repose, the time limit still would be tolled when the insider has violated Section 16(a). Statutes of repose are subject to legal tolling, as opposed to equitable tolling—and tolling of Section 16(b)'s time limit is legal tolling. It is based on a violation of federal statutory law, not general equitable principles or "background rules," as Underwriters proclaim.

Plaintiff's Section 16(b) cases are timely under any of the parties' or amici's tolling approaches. However, the Court should adopt the approach federal courts have overwhelmingly followed for the last 64 years: tolling until the insider complies with Section 16(a). That approach is most consistent with congressional intent, the legal tolling doctrine, and Section 16(a)'s filing requirement. Unlike the other approaches, it also provides a bright-line, easy-to-apply rule, consistent with this Court's recognition of how Congress designed Section 16 to operate.

ARGUMENT

I. SECTION 16(b)'S TWO-YEAR LIMITATIONS PERIOD IS SUBJECT TO TOLLING WHEN THE INSIDER HAS FAILED TO FILE ITS MANDATORY SECTION 16(a) DISCLOSURE.

A. Underwriters' No-Tolling Construction Ignores Section 16's Text and the Core Congressional Purpose of Curbing Short-Swing Speculation by Corporate Insiders.

1. The Text

Congress, through Section 16(b), bestowed on issuers the entitlement to any profits from short-swing transactions by statutory insiders as defined in Section 16(a). 15 U.S.C. § 78p(b). As stated in the first sentence of Section 16(b):

> For the purpose of preventing the unfair use of information which may have been obtained by [a Section 16(a) insider], ***any*** profit realized by him from ***any*** [short-swing transaction in issuer equity securities] ***shall inure to and be recoverable by*** the issuer.

Id. (emphasis added). In the second sentence of Section 16(b), Congress established a two-year limitations period for one remedial mechanism through which an issuer may exercise its right to obtain those profits: a lawsuit against the insider. *Id.* The time-limit clause of that sentence provides that "no such suit shall be brought more than two years after the date such profit was realized." *Id.*

Underwriters isolate the time-limit clause, viewing the text with complete disregard for the textual context of Section 16 as a whole. Yet even the bare text of the time-limit clause reveals a limitation provision "typical" of a statute of limitation, not a statute of repose. "The terms of a typical statute of limitation provide that a cause of action may or must be brought within a certain period of time." ***Beach v. Ocwen Fed. Bank***, 523 U.S. 410, 416 (1998). "[T]ypical statutes of limitations" read "no action shall be brought . . . ." ***Developments in the Law: Statutes of Limitations***, 63 Harv. L. Rev. 1177, 1186 (1950); *see also* ***Jones v. Bock***, 549 U.S. 199, 220 (2007) ("Statutes of limitations . . . are often introduced by a variant of the phrase 'no action shall be brought.'"). That is precisely how the clause in Section 16(b) reads: "no such suit shall be brought . . . ."[3] 15 U.S.C. § 78p(b).

Statutes of repose, on the other hand, talk "not of a suit's commencement but of a right's duration." ***Beach***, 523 U.S. at 417; *see also* ***Margolies v. Deason***, 464 F.3d 547, 551 (5th Cir. 2006) (statutes of repose "eliminate the underlying right"). Section 16(b)'s time-limit clause does not address the duration of an issuer's underlying right to an insider's short-swing profits. It addresses only the time to bring a lawsuit to recover such profits. 15 U.S.C. § 78p(b) ("no such suit shall be brought" referring to "[s]uit to recover such profit"). A lawsuit is not the exclusive remedial means by which an issuer may assert its right to short-swing profits. Another is offset or recoupment. The time-limit clause does not bar an issuer from recouping an insider's short-swing profits by offsetting them against related amounts otherwise owed to the insider, even if the insider realized the short-swing profits more than two years before the claimed offset. *Beach*, 523 U.S. at 415 (describing "general" rule that, absent "clearest congressional intent to the contrary," recoupment claim may offset damages even if claim is based on expired right); *Reiter v. Cooper*, 507 U.S. 258, 264 (1993) (same).

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[3] No party disputes that statutes of limitations are "customarily" subject to tolling. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (quoting *Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989)).

In short, based on the text alone, Section 16(b)'s time-limit clause is not a statute of repose because it does not extinguish the issuer's underlying right.

2. The Text of Section 16 as a Whole

Underwriters' no-tolling construction ignores the text of Section 16 as a whole. Context is crucial when interpreting Section 16(b) specifically and the federal securities laws generally. *Gollust*, 501 U.S. at 124 (reading Section 16(b) terms "in context" with legislative history and purpose); *Sec. & Exch. Comm'n v. Nat'l Sec., Inc.*, 393 U.S. 453, 466 (1969) (meanings of words in 1934 Act "must be determined in context"); *Merck & Co., Inc. v. Reynolds*, 130 S. Ct. 1784, 1800-01 (2010) (Scalia, J., concurring) (discussing importance of legislative context to understand text); *Whittaker*, 639 F.2d at 528-30 (examining legislative context, including Section 16 purpose and structure as a whole). Statutes must be "read as a whole." *King v.*

St. Vincent's Hosp., 502 U.S. 215, 221 (1991). The meaning of statutory text, "plain or not, depends on context." *Id.* Courts, therefore, should interpret statutory text that "best harmonizes with context" and promotes the "policy and objectives" of Congress. *Id.* at 221 n.10 (summarizing *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 396 (1868)).

The context of Section 16 as a whole demonstrates the significance of the subsection (a) disclosure requirement to the subsection (b) enforcement scheme. The 1934 Act implemented a "legislative philosophy" of "full disclosure." *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988). This disclosure philosophy is embodied in the text of all four subsections of Section 16 as originally enacted in 1934.

In subsection (a), Congress explicitly required the insider to disclose beneficial ownership and transaction details in SEC filings. 15 U.S.C. § 78p(a).

In subsection (b), Congress created a private action for disgorgement of profits obtained by subsection (a) insiders as a result of short-swing insider trading. 15 U.S.C. § 78p(b). Sections 16(a) and (b) are "interrelated." *Reliance Elec.*, 404 U.S. at 426. Congress enacted Section 16(b) to prevent "the unfair use of information which may have been obtained by [a Section 16(a) insider] by reason of his relationship to the issuer." *Id.* (quoting 15 U.S.C. § 78p(b)). In doing so, Congress "grammatically" linked Section 16(b)'s time limit with Section 16(a)'s disclosure obligation. Arnold Jacobs, *Section 16 of the Securities Exchange Act* § 1:1 (2006). The time-limit clause appears in the second sentence of Section 16(b) and reads: "no such suit shall be brought more than two years after the date ***such*** profit was realized." 15 U.S.C. § 78p(b) (emphasis added). "Such" profit means "any profit realized by" "such beneficial owner, director, or officer" (the first sentence of Section 16(b)), and "such" beneficial owner, director, or officer is defined in Section 16(a)(1), which sets out the persons required to file Section 16(a) reports. Contrary to Underwriters' no-tolling construction, Sections 16(a) and (b) ***must*** be read together. *Foremost-McKesson*, 423 U.S. at 234 n.1 (noting Section 16(a) defines those subject to Section 16(b)).

In subsection (c), Congress further ensured that insiders could not escape subsection (a)'s disclosure requirements. 15 U.S.C. § 78p(c). Congress included subsection (c) to prohibit a form of shorting issuer stock known as "selling against the box." H.R. Rep. No. 1383, at 24-25 (1934). Selling against the box occurs when "those in possession of inside information sell their holdings but keep the stock registered in their name, so that their change of position does not become known until delivery is made at a later date." *Id.* at 25. At the time, insiders commonly sold against the box to effectively sell stock and lock in a profit, without having to sell shares held in the insider's name—***or disclose those sales***. *Stock Exchange Regulation: Hearing Before Comm. on Interstate & Foreign Commerce on H.R. 7852 and H.R. 8720*, 73rd Cong. 133-35 (1934) (testimony of Thomas Corcoran) [hereinafter "*Interstate & Foreign Commerce Comm. Hearings*"]. Selling against the box, if permitted, would allow insiders to "conceal" their sales of issuer securities, contrary to Section 16(a). *Id.* at 134. However, shareholders "ought to be in a position where they can know" about those transactions. *Id.* at 135. Subsection (c) prohibited sales against the box to ensure that all insider sales of issuer securities would be reported under subsection (a).

In subsection (d), Congress, likewise, demonstrated its intent to link the subsection (a) disclosure requirement with the other Section 16 subsections. The 1934 Act originally contained a one-sentence subsection (d) (now subsection (e), following the 1964 amendments) relating to arbitrage. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 16(d), 48 Stat. 881 (1934) (now codified at 15 U.S.C. § 78p(e)). Arbitrage "refers to a specialized form of trading which is said to be based upon disparity in quoted prices of the same or equivalent commodities, securities, or bills of exchange." *Falco v. Donner Found., Inc.*, 208 F.2d 600, 603 (2d Cir. 1953). Subsection (d) exempted certain arbitrage transactions from Section 16, including Section 16(a)'s reporting provisions, unless the SEC adopted rules to the contrary. The SEC adopted such a rule immediately after Congress passed the 1934 Act. Romeo & Dye, *supra*, § 15.03[4] (summarizing history). The rule prohibits arbitrage transactions unless the insider reports them "in the statements required under Section 16(a)" and disgorges any short-swing profits "as provided in Section 16(b)." 17 C.F.R. § 240.16e-1.

In sum, Congress' legislative philosophy of "full disclosure" runs through the text of each of the four original subsections of Section 16. This context underscores the significance of Section 16(a)'s disclosure requirement to Section 16(b)'s enforcement mechanism. Underwriters' no-tolling construction ignores this context.

3. Congressional Purpose

Federal courts—***for over six decades***—have read Section 16(b)'s time-limit clause differently than Underwriters. Each of these courts tolls the two-year time limit when the targeted insiders have failed to file Section 16(a) reports. *Litzler*, 362 F.3d at 207-08; *Whittaker*, 639 F.2d at 527-30; *Capitol First Corp. v. Todd*, No. 04-6439 (MLC), 2006 WL 3827329, at *11 (D.N.J. 2006); *Dreiling v. Am. Online, Inc.*, No. C05-1339JLR, 2005 WL 3299828, at *4 (W.D. Wash. Dec. 5, 2005); *Segen v. Comvest Venture Partners, LP*, No. Civ.A. 04-822 JJF, 2005 WL 1320875, at *3-4 (D. Del. June 2, 2005); *Tyco Int'l Ltd. v. Kozlowski*, No. MDL 02-1335-B, 2005 WL 927014, at *3-4 (D.N.H. Apr. 21, 2005); *Dreiling v. Am. Express TRS Co., Inc.*, 351 F. Supp. 2d 1077, 1082-83 (W.D. Wash. 2004); *Rosen ex rel. Egghead.com, Inc. v. Brookhaven Capital Mgmt., Co., Ltd.*, 179 F. Supp. 2d 330, 335-39 (S.D.N.Y. 2002); *Morales v. Executive Telecard, Ltd.*, No. 95 Civ. 10202(KMW), 1998 WL 314734, at *2-3 (S.D.N.Y. June 12, 1998); *Shattuck Denn Mining Corp. v. La Morte*, No. 67 Civ. 3222, 1974 WL 373, at *2 (S.D.N.Y. Mar. 8, 1974); *Blau v. Albert*, 157 F. Supp. 816, 818-19 (S.D.N.Y. 1957); *Grossman*, 72 F. Supp. at 377-78; *Dreiling v. Kellett*, No. C01-1528P, Dkt. 114, slip op. 8-9 (W.D. Wash. Feb. 14, 2003) [JA 203-214].[4]

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[4] The one exception is *Carr-Consolidated Biscuit Co. v. Moore*, 125 F. Supp. 423 (M.D. Pa. 1954). As noted by the Ninth Circuit 27 years later, however, *Carr-Consolidated* relied on a limitations period theory later "discarded" and "renounced" by courts including this Court. *Whittaker*, 639 F.2d at 529 (citing *Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 556-59 (1974)). Other courts similarly have declined to follow *Carr-Consolidated* on the issue. *See, e.g.*, *Capitol First*, 2006 WL 3827329 at *11.

Even if the Court were to deem Underwriters' "alternative" construction of Section 16 "possible," the Court should give "the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders." *Reliance Elec.*, 404 U.S. at 424. That construction unquestionably favors Plaintiff. The core congressional purpose of "curbing the evils of insider trading" unites Sections 16(a) and (b). Jacobs, *supra*, § 1:1. Congress intended Section 16(a) to provide the information necessary to trigger Section 16(b) enforcement. 26 Michael Kaufman, *Securities Litigation: Damages* § 8:7 (2010); 2 Thomas Hazen, *Treatise on the Law of Securities Regulation* § 12.2 (1990).

This Court similarly has recognized that Section 16(b) can be enforced as Congress intended "***if*** [shareholders] find out that any such [short-swing] transactions are going on." *Gollust*, 501 U.S. at 125 n.7 (emphasis added) (quoting *Interstate & Foreign Commerce Comm. Hearings*, *supra*, 73rd Cong. 136 (testimony of Thomas Corcoran)). The only way to "find out" about purely private transactions is through Section 16(a) disclosure. These federally mandated reports "provide the basic information for seeking recovery of short-swing profits under Section 16(b)." Peter Romeo, *Insider Reporting & Liability Under Section 16 of the Securities Exchange Act of 1934* § II.A.2 (1987). They are "essential" to Section 16(b) enforcement:

> Without [Section 16(a)] reports, the information necessary to determine the existence of a possible short swing violation would not be available to the issuer and its stockholders, who are charged with enforcing Section 16(b).

Id. § II.A.6. They are the "main source of information" for suits Congress empowered shareholders to bring under Section 16(b). *Whittaker*, 639 F.2d at 528.

Congress understood when it enacted the 1934 Act that Section 16(b) enforcement presumes Section 16(a) compliance. In congressional hearings, Thomas Corcoran, a "principal drafter of the statute," *Gollust*, 501 U.S. at 125 n.7, testified:

> MR. MERRITT. Well, of course, as a matter of fact, as a matter of actual practice, if I sell my own stock, the stockholders are not going to know whether I sell or not.
>
> MR. CORCORAN. No; but the stockholders ought to be in a position where they can know, and under section 15(a) [now Section 16(a)] they would be.
>
> MR. MERRITT. Any time a director sells some stock, he does not send a notice to all of the stockholders that he has sold his stock?
>
> MR. CORCORAN. No; not everyone; but once a month [now within two days of trading] the bill would require him to report what his stock changes are. Otherwise the insider is at a decided advantage.

Interstate & Foreign Commerce Comm. Hearings, *supra*, 73rd Cong. 135; *see also* SEC Interpretative Release, 46 Fed. Reg. at 481472 (Congress understood Section 16(a) reports would foster Section 16(b) enforcement because the reports "may reveal insider purchases and sales of securities which are subject to the profit recovery provision" of Section 16(b).).

The only two circuit courts to have considered the question agree that Congress' core purpose in enacting Section 16 would be frustrated if targeted insiders could escape Section 16(b) liability by failing to comply with their Section 16(a) reporting obligations. The Second Circuit has held that "to allow an offending investor to escape responsibility under Section 16(b) by violating the provisions of Section 16(a) would manifestly frustrate the purpose of Congress." *Litzler*, 362 F.3d at 207. Section 16(b)'s "prophylaxis" "works by imposing an absolute duty of disclosure upon insiders" under Section 16(a). *Id.* at 208. The Ninth Circuit similarly has held that a rule allowing insiders to "escape liability by not reporting as required under Section 16(a)" would "thwart[]" Congress' purpose in enacting Section 16 to "curb insider trading." *Whittaker*, 639 F.2d at 528. Section 16(b)'s "short" two-year limitations period "is understandable only in the context of the insider's duty to make prompt disclosure" in Section 16(a) reports. *Id.*

Underwriters argue "there is no reason to toll the time limit for filing an action under Section 16(b) until a defendant files a Section 16(a) disclosure" because Section 16(a) can be enforced in other ways, including "criminal sanctions" under Section 32. Pet. Br. 33-34. However, "[n]ot every violation of 16(a) is denounced as a crime by Sec. 32." *Grossman*, 72 F. Supp. at 379.

Even if criminal and civil sanctions were coextensive, an insider who has violated both Sections 16(a) and (b) should not be placed in a better position than one who has violated only Section 16(b). *Id.* Regardless, the government has rarely, if ever, invoked criminal sanctions "because it believes its first effort should be directed toward obtaining the disclosure of the information withheld." Cook & Feldman, *supra*, at 406. In the words of Justice Brandeis: "Sunlight is the best disinfectant." Louis Brandeis, *Other People's Money* 92 (1932).

B. Original and Continued Congressional Intent Establishes a Tollable Two-Year Time Limit When Section 16(a) Reports Have Not Been Filed.

1. Original Congressional Intent

Underwriters rely on the Court's use of the phrase "period of repose" when referencing Section 16(b) in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). Pet. Br. 2-3. In *Lampf*, this Court rejected application of "equitable tolling" to claims arising under Section 10(b) of the 1934 Act. 501 U.S. at 363. Because Section 10(b) does not expressly contain a limitations period, the Court analyzed other causes of action in the 1934 Act, including those that incorporated some variation of a two-prong time limit (a one-year discovery period coupled with a three-year period of repose). *Id.* at 359-62.

Underwriters repeatedly mischaracterize the two-prong time limits as "companion" limitations periods to Section 16(b). Pet. Br. 3, 15, 21, 22, 24-25. The Court in *Lampf* was clear that they are not. Section 16(b) "differs in focus" from the other types of claims available under the 1934 Act, including those arising under Section 10(b). *Lampf*, 501 U.S. at 360 n.5. As a result, Section 16(b) was ***not*** "an appropriate source from which to borrow a limitations period." *Id.*

The Court correctly viewed Section 16 as unique. The two-prong limitations provisions contain language that materially differs from Section 16(b). *Compare* 15 U.S.C. §§ 78i(e), 77m, 78r(c), *and* 28 U.S.C. § 1658(b), *with* 15 U.S.C. § 78p(b). *See also Merck*, 130 S. Ct. at 1790, 1795; *Lampf*, 501 U.S. at 360. The two-prong provisions include express discovery rules focused on the ***plaintiff*** (whether the plaintiff, or a reasonably diligent plaintiff, discovered certain facts supporting the cause of action). 15 U.S.C. §§ 78i(e), 77m, 78r(c); 28 U.S.C. § 1658(b); *Merck*, 130 S. Ct. at 1790, 1795; *Lampf*, 501 U.S. at 360. Section 16 contains its own, differently worded, two-year time limit, ***no*** discovery rule, and, instead, a unique disclosure obligation focused on the ***defendant*** (whether the defendant disclosed short-swing transactions in Section 16(a) reports). 15 U.S.C. § 78p.[5]

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[5] Underwriters contend that the two-prong limits in other parts of the 1934 Act show Congress knew how to draft a discovery rule if it wanted to and that Congress must not have wanted to with Section 16 because it did not use similar language. Pet. Br. 19, 21-22. However, Congress did not intend to create a discovery rule with Section 16 in the first place. Tolling the time limit when an insider fails to file a Section 16(a) disclosure has nothing to do with whether a ***plaintiff*** discovers the claim (or even reads a Section 16(a) report). Tolling is based on a ***defendant***'s statutory reporting violation. *See infra* at 39-44.

The difference between Section 16(b)'s time limit and the two-prong time limits in other sections of the 1934 Act was not lost on Congress during the original drafting of the legislation. Congress considered—and then ***rejected***—repose language for Section 16(b) that mirrored every other time limit in the 1934 Act. The drafting sequence is unambiguous. An April 13, 1934 draft House bill contains the first indication of congressional consideration of a limitations period for Section 16(b) (then Section 15(a)). H.R. Comm. on Interstate & Foreign Commerce, 73rd Cong., Securities Exchange Bill 48 (Subcomm. Print Apr. 13, 1934).[6] The draft bill contains handwritten notes reflecting a desire to add a two-prong limitations provision akin to the other sections of the 1934 Act: "6 mo. if disclosed under (a), otherwise 3 years." *Id.* In an April 18, 1934 print, the two-prong limitations provision had been typed for further consideration using the following language: "No such suit may be brought more than six months after such profit was realized if the facts upon which such suit was based were disclosed by a statement filed pursuant to subsection (a), or more than three years after such profit was realized if the facts were not so disclosed." H.R. Comm. on Interstate & Foreign Commerce, 73rd Cong., Securities Exchange Bill 51 (Subcomm. Print Apr. 18, 1934). This two-prong time-limit language was then deleted in the April 26, 1934 print. H.R. Comm. on Interstate & Foreign Commerce, 73rd Cong., Securities Exchange Bill 40-41 (Comm. Print Apr. 26, 1934). Finally, a comparative print reflecting the differences between the House bill with the deleted language and the Senate version shows, for the first time, an intent to consider alternative "statute of limitations" language: "no such suit shall be brought more than 2 years after the date such profit was realized." Comm. of Conf., 73rd Cong., Securities Exchange Act of 1934 48 (Comparative Print Apr. 26, 1934). This was the language on which Congress settled.

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[6] The legislative history documents discussed herein were located at the National Archives and SEC, and are not readily accessible to the public. The parties have lodged them with the Clerk of this Court.

Underwriters acknowledge that Congress chose not to adopt two-prong limitations language but nevertheless maintain that Congress "adopted a repose approach." Pet. Br. 25. However, the two-prong limitations language *was* Congress' "repose approach." When Congress wanted to incorporate a "repose approach" in the 1934 Act, it drafted two-prong limitations provisions every time. It considered, but rejected, that language for Section 16(b). Congress therefore must have had a different intent with Section 16(b).[7] "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001); *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

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[7] Underwriters speculate that "Congress would not have given repose to defendants who may have engaged in knowing securities violations" of other 1934 Act provisions but denied repose to defendants who committed an "innocent" Section 16(b) violation. Pet. Br. 23. However, when plaintiffs will not usually be aware of an injury at the time of defendant's conduct, "avoidance of the injustice" "would seem of greater moment than the desirability of repose." *Developments in the Law: Statutes of Limitations*, *supra*, at 1204. Section 16(b) is unique in that there is no external event noticeable by shareholders to indicate a potential claim, e.g., a sudden drop in an issuer's stock price. Section 16(a) disclosures provide the only realistic opportunity for shareholders to learn of short-swing insider trading.

Federal courts had this same understanding as early as 1981 when *Whittaker* was decided. The Ninth Circuit in *Whittaker* accurately forecasted this Court's decision in *Lampf* that the other time limits in the 1934 Act (all two-pronged) contained a three-year period of "absolute" repose not subject to tolling. *Whittaker*, 639 F.2d at 530. However, "the absence of similar language creating a maximum time limit in § 16(b) shows Congress contemplated tolling" when Section 16(a) reports have not been filed. *Id.*

2. Continued Congressional Intent

Underwriters mischaracterize Section 16 tolling as "novel." Pet. Br. 35. Numerous federal courts throughout the country have considered the issue over Section 16's 77-year history. *See supra* at 23 (listing cases). With only one exception later "renounced," each court reached the same conclusion: the two-year time limit for Section 16(b) claims is tolled when Section 16(a) information has not been disclosed. *Id.*

Of all these decisions, none has analyzed Section 16's text, context, structure, and legislative history, and case law as thoroughly as *Whittaker* did 30 years ago. The case has achieved landmark status in Section 16 jurisprudence as a result. After *Whittaker*, every

Section 16(b) case throughout the country that examined the two-year period adopted *Whittaker*'s fundamental analysis and concluded that the time limit is tolled when the targeted insiders have not complied with Section 16(a). *Id.* The leading Section 16 commentators have consistently trumpeted *Whittaker*'s holding and rationale. *See, e.g.*, William Wang & Marc Steinberg, *Insider Trading* § 14:3 (2008) (analyzing various approaches, including "*Lampf* argument," and concluding that, given "congressional intent underlying section 16," courts should adopt *Whittaker*'s "disclosure rationale" requiring tolling until a Section 16(a) report is filed); Romeo & Dye, *supra*, § 9.03[3][b]; Jacobs, *supra*, § 3:52.

Congress revisited Section 16 on several occasions during this same three-decade time period. *See, e.g.*, Commodity Futures Modernization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-365 (2000); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). Each time, Congress declined to amend Section 16 and alter the widespread acceptance of tolling. This "silence" constitutes strong continuing congressional intent that Section 16(b)'s limitations period is subject to tolling when Section 16(a) reports have not been filed. *Gulf Oil*, 419 U.S. at 200-01 (concluding "continued congressional silence" despite "long-standing interpretation" of federal statute shows long-standing interpretation is consistent with congressional intent); *United States v. Heredia*, 483 F.3d 913, 918-19 (9th Cir. 2007) (holding congressional inaction following "widespread acceptance" of "long-standing" judicial precedent shows Congress' "acquiescence" in such precedent).

(a) Commodity Futures Modernization Act of 2000

The Commodity Futures Modernization Act of 2000 ("CFMA") amended Section 16 in two respects. Congress amended Section 16(a) to include a reporting requirement for a purchase or sale of "a security-based swap agreement," and amended Section 16(b) to include a disgorgement obligation on an insider who profits from a short-swing transaction in "a security-based swap agreement." CFMA § 303(g), 114 Stat. at 2763A-455 to 456 (codified at 15 U.S.C. 78p(a), (b)). In the words of principal sponsor Senator Gramm, the CFMA "will now allow new and important financial products – single stock futures – to be sold in America. It protects financial institutions from over-regulation, and provides legal certainty for the $60 trillion market in swaps." 146 Cong. Rec. S11855, 11866 (daily ed. Dec. 15, 2000).

The CFMA also prohibited the SEC from imposing ***any*** reporting requirement on security-based swap agreements, ***except one***: Section 16(a). CFMA § 303(a), 114 Stat. at 2763A-453 (codified at 15 U.S.C. 78c-1(b)(3)). Former SEC Chairman Arthur Levitt had stressed the critical need for maintaining an insider reporting requirement for the soon-to-be-allowed swap agreements:

> Without direct authority over the futures exchange ***or a requirement for insider reporting***, the SEC may have difficulty ***ever*** learning of the futures purchase by the insider. Such activities could destroy years of

> Commission efforts to protect investors from insider trading abuses.

Testimony Concerning S. 2697 Before the Senate Comm. on Agriculture, Nutrition, and Forestry and Comm. on Banking, Housing, and Urban Affairs, 2000 WL 900794, at *6 (June 21, 2000) (emphasis added).[8] In sum, Congress relied on Section 16 to ensure that "[i]nsider trading provisions of the Securities Exchange Act will be applied to single stock futures transactions." 146 Cong. Rec. S11855, 11867 (daily ed. Dec. 15, 2000) (statement of Senator Gramm). However, Congress left undisturbed the federal courts' longstanding treatment of Section 16's two-year time limit.

Congress is presumed to enact or amend statutes with knowledge of "relevant judicial precedent." *Merck*, 130 S. Ct. at 1795-96; *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951). There is no need to presume such knowledge with the CFMA however. Congress incorporated relevant Section 16 "judicial precedents" explicitly:

> Judicial precedents decided under section . . . 78p [Section 16] of this title, and judicial rules promulgated under such section[], shall apply to

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[8] Amici curiae supporting Underwriters charge that the "specialized plaintiffs' bar has all the resources needed to detect legitimate claims under Section 16(b)" without Section 16(a). Br. for Chamber of Commerce, et al. as Amici Curiae 21. Yet Chairman Levitt's testimony demonstrates that "incentives" and "resources"—even at the SEC's scale --matter little when it comes to learning of insiders' securities transactions.

> security-based swap agreements to the same extent as they apply to securities.

CFMA § 303(d), 114 Stat. at 2763A-454 (codified at 15 U.S.C. § 78j). Congress would not have expressly subjected trading in swap agreements to Section 16 "judicial precedents" if it disagreed with the widespread acceptance of *Whittaker*.

(b) Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") shortened the filing deadline under Section 16(a) from ten days after the end of the month in which the transaction occurs, to two days from the date of the transaction. *Compare* 15 U.S.C. § 78p(a) (2000), *with* Sarbanes-Oxley § 403(a), 116 Stat. at 788 (codified at 15 U.S.C. § 78p(a)(2)(C)). Although amending subsection (a), Congress again left undisturbed the two-year limitations period in subsection (b). By this time, federal courts had widely interpreted Section 16(b) as subject to tolling for more than two decades.

Sarbanes-Oxley also addressed the limitations periods for suits brought under Section 10(b). Sarbanes-Oxley § 804(a), 116 Stat. at 801 (codified at 28 U.S.C. § 1658(b)). Congress ***lengthened*** Section 10(b) post-*Lampf* from the one-year/three-year period to a two-year/five-year period because the old limitations period "is so short, the worst offenders may avoid accountability and be rewarded if they can successfully cover up their misconduct for merely three years [and] [t]he more complex the case, the easier it will be for these wrongdoers to get away with fraud." 148 Cong. Rec. S6524, 6528-29 (July 10, 2002) (testimony of Senator McCain). Congress had no reason to have this same concern about Section 16(b)'s two-year period given the widespread acceptance of *Whittaker*.

In short, Congress has examined Section 16 on several occasions over the last few decades. Over the course of those decades, courts throughout the country have consistently followed *Whittaker* and tolled Section 16(b)'s two-year limitations period when no Section 16(a) report has been filed. Congress never expressed disagreement with these "judicial precedents"—in fact, it has explicitly endorsed them. This shows conclusive continuing congressional intent that Section 16(b) is subject to tolling when insiders fail to file Section 16(a) reports.

C. Section 16(b)'s Limitations Period Is Subject to Section 16 Tolling Even if Construed as a Statute of Repose.

1. Equitable Versus Legal Tolling

Equitable tolling is a judicially created doctrine that keeps a statute of limitations from running in situations involving unfairness or excusable mistake. *Lampf*, 501 U.S. at 363; *Joseph v. Wiles*, 223 F.3d 1155, 1166 (10th Cir. 2000); *Arivella v. Lucent Techs.*, 623 F. Supp. 2d 164, 176 (D. Mass. 2009). *Lampf* held that "the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure" in the 1934 Act. 501 U.S. at 363. Equitable tolling is "unnecessary" to the one-year period because it contains its own express discovery rule. *Id.* Equitable tolling also is "inconsistent" with the three-year period of repose because it is meant "clearly to serve as a cutoff." *Id.* *Lampf* did not address the doctrine of legal tolling.

Equitable tolling is distinct from legal tolling. ***Joseph***, 223 F.3d at 1166; ***Arivella***, 623 F. Supp. 2d at 176. **"The Financial Institutions"—including many Underwriters herein—"have blurred the distinction between legal tolling . . . and equitable tolling."** ***In re Enron Corp. Secs. Deriv. & ERISA Litig.***, **529 F.** Supp. **2d 644, 707 (S.D. Tex. 2006). "[T]hey refer to both as equitable tolling. They are not the same."** ***Id.*** **Legal tolling is predicated on application of law, not general** principles of equity. Legal tolling may be "derived from a statutory source." ***Arivella***, 623 F. Supp. 2d at 176.

2. Statutes of Repose Are Subject to Legal Tolling.

Unlike equitable tolling, legal tolling is not inconsistent with statutes of repose. ***Joseph***, 223 F.3d at 1167; ***Arivella***, 623 F. Supp. 2d at 176. The distinction between legal and equitable tolling has surfaced most frequently when courts have decided whether statutes of repose are subject to tolling under *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974). *American Pipe* held that the commencement of the original class suit tolls the running of a statute of limitation for all purported class members who make timely motions to intervene after the court has declined class certification. 414 U.S. at 553. The Court extended *American Pipe* to putative class members who seek to file individual suits after denial of class certification. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983).

Federal courts have determined consistently that "*American Pipe* tolling" applies to statutes of repose—consistent with *Lampf*—because *American Pipe* tolling is legal, not equitable, in nature. *See, e.g.*, ***Joseph***, 223 F.3d at 1166 (legal tolling of statute of repose in Section 10(b) of 1934 Act); ***Maine State Ret. Sys. v. Countrywide Fin. Corp.***, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010) (accepting legal tolling of repose statutes in Securities Act of 1933); ***Arivella***, 623 F. Supp. 2d at 177-78 (legal tolling of statute of repose in Section 413 of Employee Retirement Income Security Act of 1974); ***Andrews v. Chevy Chase Bank, FSB***, 243 F.R.D. 313, 316-37 (E.D. Wis. 2007) (legal tolling of repose period for rescinding home loans in Truth in Lending Act); ***In re Enron Corp. Secs. Deriv. & ERISA Litig.***, 465 F. Supp. 2d 687, 717 (S.D. Tex. 2006) (legal tolling of statutes of repose in 1934 Act); ***Ballard v. Tyco Int'l, Ltd.***, No. MDL 02-MD-1335-PB, 2005 WL 1683598, at *7 (D.N.H. July 11, 2005) (legal tolling of statutes of repose in 1934 Act); ***Official Comm. of Asbestos Claimants of G-I Holding, Inc. v. Heyman***, 277 B.R. 20, 30-32 (S.D.N.Y. 2002) (legal tolling of statute of repose in state fraudulent transfer act); *see also* ***Albano v. Shea Homes Ltd. P'ship***, 634 F.3d 524, 535, 538 (9th Cir. 2011) (noting weight of federal authority favors view legal tolling of statutes of repose post-*Lampf*; certifying question to state court for final analysis under state law); ***Bright v. United States***, 603 F.3d 1273, 1287-88 (Fed. Cir. 2010) (holding "jurisdictional" statute subject to *American Pipe* tolling because it constitutes legal/statutory, not equitable, tolling).[9]

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[9] The Southern District of New York is the only court to reach a different conclusion. *See Footbridge Ltd. Trust v. Countrywide*

American Pipe is properly viewed as "a species of legal tolling" because the tolling "is derived from a statutory source," not equitable principles. *Arivella*, 623 F. Supp. 2d at 176 (quoting *Newport v. Dell, Inc.*, No. CV08-0096-TUC, 2008 WL 4347311, at *4 n.8 (D. Ariz. Aug. 21, 2008)); *see also Stone Container Corp v. United States*, 229 F.3d 1345, 1354 (Fed. Cir. 2000) (noting Fed. R. Civ. P. 23, like all federal civil court rules, is "as binding as any federal statute" (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988))).

3. Tolling When Insiders Fail to Comply With Section 16(a) Is Legal, Not Equitable, Tolling.

Section 16 tolling is properly viewed, like *American Pipe* tolling, as a species of legal, not equitable, tolling. Section 16 tolling is based on application of a federal statute—Section 16(a)—not principles of equity. *Whittaker*, 639 F.2d at 527-30. In *Whittaker*, the Ninth Circuit examined three interpretations of Section 16(b)'s two-year time limit: strict no-tolling,

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Fin. Corp., 770 F. Supp. 2d 618 (S.D.N.Y. 2011) (determining *American Pipe* tolling does not apply to statute of repose in Section 13 of 1934 Act). *Footbridge* reasoned *American Pipe* applied equitable, not legal, tolling and relied on the time-limit language "in no event" to conclude that Section 13 provides for a period of absolute repose. *Id.* at 624. Regardless of the basis of *American Pipe* tolling, tolling based on Section 16(a) is clearly legal, not equitable, in origin for the reasons discussed above. Further, Section 13's "in no event" language appears throughout the 1934 Act but is nowhere to be found in Section 16(b). Congress considered such language when drafting Section 16(b)—i.e., clear-cut repose language—but rejected it. *See supra* at 29-30.

"notice" or "discovery," and "disclosure." *Id.* The court concluded the disclosure interpretation—tolling until the insider discloses its transactions in statutorily-mandated Section 16(a) reports—best comports with congressional intent. *Id.* The Ninth Circuit did not label the tolling as "legal" or "equitable." However, its rationale is grounded in the legal requirement that insiders disclose their short-swing trading activities under Section 16(a), not generalized equitable principles.[10] *Id.* The court only mentioned "equitable tolling" in a footnote regarding fraudulent concealment theory as a mere "step in the analysis toward the disclosure interpretation." *Id.* at 527 n.9. The disclosure interpretation itself, however, depends on application of Section 16—specifically that "§ 16(b) is interrelated with the congressionally created reporting requirements of § 16(a)." *Id.* at 530.

Tolling the two-year period for Section 16 disgorgement claims when insiders do not comply with

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[10] Were there ever a case where equities favored an insider who failed to comply with Section 16(a), it might well have been *Whittaker* itself. The district court entered factual findings after trial "that various corporate officers had information which put the Corporation [the Section 16(b) claimant] on notice through the relevant trading period." *Whittaker*, 639 F.2d at 527; *see also Whittaker v. Whittaker Corp.*, No. 77-2297, 1977 U.S. Dist. LEXIS 16777, at *23-26 (C.D. Cal. Mar. 22, 1977) (summarizing actual notice evidence). The trial court then applied the notice rule and dismissed a portion of the plaintiff's claim as beyond the limitations period. *Whittaker*, 1977 U.S. Dist. LEXIS 16777, at *26; *see also Whittaker*, 639 F.2d at 527. The Ninth Circuit reversed—but not because the trial court lacked sufficient notice evidence or failed to balance the parties' equities properly. It reversed because Section 16(a) noncompliance tolls Section 16(b)'s time limit. This is legal, not equitable, tolling.

Section 16(a) is "consonant with the legislative scheme." *Am. Pipe*, 414 U.S. at 557-58; *Whittaker*, 639 F.2d at 527 (citing *Am. Pipe*, 414 U.S. at 556-59). The text, context, and original and continuing congressional intent support tolling when Section 16(a) reports have not been filed. *See supra* at 17-36. Tolling respects Section 16(a)'s requirement that insiders affirmatively disclose their short-swing transactions. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (Complementing the "principle that courts are to interpret the words of a statute in context" is the "rule" that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."). Congress placed the responsibility for observing Section 16(a) and Section 16(b) on the insider. *See Whiting v. Dow Chem. Co.*, 523 F.2d 680, 687 (2d Cir. 1975) (insiders have no one to blame but themselves). Underwriters' no-tolling rule would change the insiders' burden of affirmative disclosure into an impossible burden of discovery onto shareholders (those to whom Congress gave "ultimate" Section 16(b) enforcement authority). *Gollust*, 501 U.S. at 122.

Congress intended Section 16 to operate "mechanically"—a "crude rule of thumb" that can be easily applied in an "objective," "bright-line" fashion. Jacobs, *supra*, § 3:1; *see also Gollust*, 501 U.S. at 122 (Section 16(b) requires "mechanical" application); *Foremost-McKesson*, 423 U.S. at 251 (Congress intended Section 16 to be easy-to-apply, "crude rule of thumb"); *Reliance Elec.*, 404 U.S. at 422 (Congress intended Section 16 to be capable of easy administration, applied with "objective standards"); *Litzler*, 362 F.3d at 208 ("Section 16 compels disclosure . . . so clear that an insider's short-swing profits will be discovered without any investigation other than the putting together of two and two."); *Colan v. Mesa Petroleum Co.*, 951 F.2d 1512, 1519 (9th Cir. 1991) (summarizing authorities showing Congress meant Section 16 as "bright-line" rule); *Whittaker*, 639 F.2d at 529 (Congress intended "to impose absolute accountability within clearly demarcated boundaries," a "goal" "served by a limitations period which can be mechanically calculated from objective facts").

The connection between Section 16(b)'s profit-disgorgement provision with Section 16(a)'s disclosure obligation provides "the certainty of operation of the statute that Congress was seeking when creating such a crude 'rule of thumb' [and is] in keeping with the 'objective measure of proof' contemplated by Congress." Wang & Steinberg, *supra*, § 14:6.3 (citing *Smolowe v. Delendo Corp.*, 136 F.2d 231, 235 (2d Cir. 1943); *Stock Exchange Practices, Hearings Before Senate Comm. on Banking & Currency*, 73 Cong. 6557 (1934) [hereinafter "*Banking & Currency Comm. Hearings*"]; 5 Louis Loss & Joel Seligman, *Securities Regulation* 2321-2482 (2001)); *see also Whittaker*, 639 F.2d at 529. Like Fed. R. Civ. P. 23 tolling, Section 16 tolling "involves a simple mathematical computation." *Arivella*, 623 F. Supp. 2d at 179. There is no "reasonableness" or "diligence" inquiry; it is purely objective. *Id.* A Section 16(a) report is either filed or not filed. Tolling is keyed off the filing date. A court need only apply "simple math" to determine the two-year period. *Id.* Shareholders also know where to find Section 16(a) reports without having to search "disparate sources of information."[11] *Litzler*, 362 F.3d at 208.

Two salutary benefits flow from such a bright-line rule. First, courts can take judicial notice of Section 16(a) reports. *Dreiling v. Am. Express Co.*, 458 F.3d 942, 946 n.2 (9th Cir. 2006); *Payne v. DeLuca*, 433 F. Supp. 2d 547, 565 n.11 (W.D. Pa. 2006). They can, therefore, resolve Section 16 tolling issues early in litigation as the Ninth Circuit did here. *See, e.g.*, JA 213-214; *Am. Express*, 351 F. Supp. 2d at 1082-83. Second, Section 16 tolling allows shareholders to easily and accurately assess the limitations issue before making a pre-suit demand and commencing litigation under Section 16(b). Romeo & Dye, *supra*, § 9.03[3][b] ("[T]olling until all security holders are given the information in a Section 16(a) report . . . is essential to an informed evaluation of a potential claim.").

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[11] The only disclosure fairly chargeable to shareholders, consistent with the Section 16(a) mandate, is the disclosure of short-swing activity in Section 16(a) reports. *Whittaker*, 639 F.2d at 528 (citing Cook & Feldman, *supra*, 414). Section 16(a) reports operate like filed tariffs or lis pendens. Filing in a publicly accessible, single repository is deemed "notice to the world." *Adams v. Mills*, 286 U.S. 397 (1932) (tariff); *United States v. Real Prop. at 2659 Roundhill Dr.*, 283 F.3d 1146, 1155 (9th Cir. 2002) (lis pendens). Interested people know to check tariffs filed with governmental agencies. They know to check lis pendens filed with county auditors. Those interested in carrying out Congress' intent to patrol short-swing insider trading know to check Section 16(a) reports filed with the SEC. They should not have to research newspapers, magazines, or court dockets throughout the country to learn of a potential claim when federal law requires insiders to file Section 16(a) reports in a single, publicly accessible place. Were the law otherwise, insiders would have an incentive not to file Section 16(a) reports and would be rewarded for their noncompliance.

Underwriters call their no-tolling rule "straightforward," Pet. Br. 31, but it would be difficult for courts and litigants to apply. The no-tolling rule is keyed off insider trading dates. Without Section 16(a) reports, however, trading dates would be ascertainable only through depositions and document requests made after litigation commenced. Even then, the plaintiff would have to ensure trading records the insider provided during discovery were authentic, accurate, and reflective of every targeted transaction. This would be a difficult, time-consuming, and expensive discovery process in ordinary Section 16(b) cases—not to mention those cases involving "unorthodox" transactions, *Kern County*, 411 U.S. at 593 n.24, shares held in others' names, or group issues. In many cases, it would generate contested factual issues for trial. This cannot be the bright-line system Congress intended when it ***required*** insiders to report under Section 16(a).

4. Legal Tolling of Section 16(b) Is Not Based on "Background Rules" or the Discovery Rule.

Section 16 legal tolling is not "extra-textual" or based on "background rules." Pet. Br. 3, 15, 27. It is based on an insider's failure to comply with the "text" of a federal statute requiring insiders to disclose their securities transactions. Nor is legal tolling a "discovery rule." *Id.* 2, 15, 17-18. Tolling when an insider fails to file Section 16(a) reports is not based on a plaintiff's subsequent discovery of short-swing insider trading in violation of Section 16(b). It is not based on a plaintiff's conduct at all. It is based on whether (and when) the defendant complies with Section 16(a).

Section 16 contains no "discovery rule" that would render tolling (legal or equitable) "unnecessary," unlike the other time limits in the 1934 Act. *Lampf*, 501 U.S. at 363. For this reason, courts and commentators have rejected Underwriters' argument and concluded that *Lampf* does not prevent tolling the Section 16(b) limitations period when the insider has failed to comply with Section 16(a). Wang & Steinberg, *supra*, § 14:3; Marc Steinberg & Daryl Landsdale, Jr., *The Judicial and Regulatory Constriction of Section 16(b) of the Securities Exchange Act of 1934*, 68 Notre Dame L. Rev. 33, 59-60 (1992) (same). Excluding the district court decision at bar, ten decisions post-*Lampf* have addressed whether Section 16(b) should be tolled when the targeted insider failed to file Section 16(a) reports. All ten toll the statute. *Litzler*, 362 F.3d at 207; *Capitol First*, 2006 WL 3827329 at *11; *Am. Online*, 2005 WL 3299828, at *4; *Am. Express*, 351 F. Supp. 2d at 1082-83; *Rosen*, 179 F. Supp. 2d at 335-39; *Morales*, 1998 WL 314734, at *2-3; *Segen*, 2005 WL 1320875, at *3-4; *Tyco Int'l*, 2005 WL 927014, at *3-4; *Tristar*, 867 F. Supp. 149, 154 n.4 (E.D.N.Y. 1994); *Kellett*, slip op. at 9 (JA 213-214). Two of these cases explicitly reject the same argument Underwriters make to this Court. *Kellett*, slip op. at 9 (JA 213-14); *Tristar*, 867 F. Supp. at 154 n.4. The Ninth Circuit did the same in *Whittaker*—ten years ***before*** *Lampf*. *See supra* at 31.

D. Underwriters' No-Tolling Rule Is Inconsistent With Congress' Intent Because It Rewards Insiders Who Intentionally Violate Section 16(a).

Congressional intent would be thwarted if insiders could escape liability by not reporting as Section 16(a) requires. *Whittaker*, 639 F.2d at 528. Underwriters' no-tolling rule would incentivize insiders not to file Section 16(a) disclosures:

> It would be a simple matter for the unscrupulous to avoid the salutary effect of Section 16(b) which provides a remedy for the recovery of short term profits, simply by failing to file [Section 16(a) reports] and thereby concealing from prospective plaintiffs the information they would need to adequately protect their interests. Such a construction would reward the violation of the statute and would manifestly frustrate congressional intent.

Id. (quoting *Blau*, 157 F. Supp. at 819 (citing *Grossman*, 72 F. Supp. at 378-79)). Section 16(b) would be nullified if insiders could conceal their short-swing transactions by not filing Section 16(a) reports and then waiting two years to avoid any possible disgorgement liability:

> "Only by full compliance with Section 16(a) can the security holders be charged with adequate notice of the transaction." Such shareholders are likely to be outsiders, minority holders. Their main source of information for the suits Congress has empowered them to bring likely will be the required § 16(a) reports. If insiders could insulate their transactions from the scrutiny of outside shareholders by failing to file § 16(a) reports and waiting for the two year time limit to pass, then Congress' creation of these shareholders' derivative suits would be nullified.

Id. (quoting Cook & Feldman, *supra*, at 414) (footnote omitted); *see also Litzler*, 362 F.3d at 207; Steinberg & Landsdale, *supra*, at 59.

A no-tolling rule would effectively end Section 16(b) enforcement against the most devious Section 16 violators—those that conceal their inside, short-swing transactions by intentionally not filing required Section 16(a) reports until two years thereafter, or ever. Such a result would "make the law which was designed to prevent fraud the means by which it is made successful and secure." *Exploration Co. v. United States*, 247 U.S. 435, 447 (1918); *see also Merck*, 130 S. Ct. at 1793 ("This Court long ago recognized that something different was needed . . . where a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." (emphasis in original)).

E. Legal Tolling Does Not Risk "Indefinite Liability."

Legal tolling when insiders fail to file Section 16(a) reports helps "'insure the maintenance of fair and honest markets,'" *Kern County*, 411 U.S. at 591 (quoting 15 U.S.C. § 78b), because it allows Section 16(b) cases to proceed against the worst violators. It does not, as Underwriters assert, create a never ending threat of litigation. Pet. Br. 36-37. To end tolling, insiders need only fulfill their Section 16(a) obligation and file the disclosures. Such an approach "seems most in accord with the congressional intent underlying section 16." Wang & Steinberg, *supra*, § 14:3; *see also* Romeo & Dye, *supra*, § 5.04[2][c] (noting Section 16(a) reports can be filed any time).

Underwriters assert, on the one hand, that Plaintiff and other shareholders should be deemed to have known facts underlying this Section 16(b) claim based on information available in the public domain. Pet. Br. 3, 42. On the other hand, Underwriters claim they themselves had no notice of any obligation to file Section 16(a) reports.[12] *Id.* 35. They, in essence, argue they had no duty to comply with Section 16(a) because they are not statutory insiders. *Id.* 35-36. However, bootstrapping of a disputed core merits defense is inappropriate when analyzing the Section 16 tolling issue on a motion to dismiss. Pet. App. 65a (citing *Santa Maria v. Pac. Bell*, 202 F.3d 1170, 1177 (9th Cir. 2000)); *Am. Online*, 2005 WL 3299828, at *4; *Kellett*, slip op. at 9 (JA 214). On a motion to dismiss, Plaintiff's factual allegations supporting essential Section 16(b) elements such as group and insider status must be deemed true. *Id.*; *see also Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). As noted by the United States as Amicus Curiae, "Respondent's allegations . . . encompassed all of the facts necessary to establish petitioners' obligation to disclose the transactions under Section 16(a)." Br. for United States as Amicus Curiae 18; *see also* JA 61-63.

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[12] Underwriters persuaded the district court that they never would have known to file Section 16(a) reports given Plaintiff's "theory." However, the district court inaccurately summarized that "theory" as "allocating IPO shares to their best customers in return for more business could lead to Section 16(b) liability." Pet. App. 109a-110a. The instant, risk-free profits were allocated to Issuer decision-makers, not to the Issuer itself, in return for the decision-makers exerting their influence to direct future business of the Issuer to Underwriters. Simply put, Underwriters were using IPO allocations to bribe Issuer decision-makers.

The only issue relevant to Section 16 legal tolling, therefore, is whether Section 16(a) reports were filed.

Underwriters' position is at odds with the facts regardless. There can be no real debate that Underwriters had actual notice of their own conduct at the time it occurred. They knew they entered into kickback arrangements with select customers to share profits from short-swing trades in Issuer securities. They knew they engaged in this conduct to hide from regulators their beneficial ownership of shares traded for a profit in the IPO aftermarket. Underwriters therefore must have known their "good faith" underwriting exemption from Section 16(a)'s reporting requirement was in serious jeopardy, if not entirely lost. They also must have known their coordinated underpricing scheme might constitute "group" activity that could expose themselves and others group members, as statutory insiders, to Section 16(b) liability.

As Plaintiff's cases underscore, the ability to limit the duration of Section 16(b) liability exposure lies exclusively with the insider. Underwriters could have filed Section 16(a) reports and avoided any risk of so-called "indefinite liability" even if they disagreed that they were subject to Section 16. Filing Section 16(a) reports would not be "essentially admitting liability" as Underwriters claim. Pet. Br. 37. The reports could have been filed, without prejudice, reserving all rights Underwriters undoubtedly will claim in these cases. For example, filing a Section 16(a) report is not an admission of group membership. *Morales*, 249 F.3d at 129. Nor does it concede beneficial ownership. 17 C.F.R. § 240.16a-1(a)(4).

Finally, these cases do not involve the rare circumstances about which Second Circuit Judge Jacobs expressed concern: "a claim that affects long-settled transactions might hang forever over ***honest*** persons." *Litzler*, 362 F.3d at 208 n.5 (emphasis added). This position was neither the Second Circuit's holding nor dictum. It was a side-comment addressing what Judge Jacobs "would have preferred to say." *Id.* In any event, Underwriters' conduct was anything but "honest." They engaged in prohibited, bad-faith kickback schemes that unlawfully concealed their beneficial ownership in Issuer securities by conducting short-swing trades through customer accounts.[13]

Underwriters' level of culpability is irrelevant to Section 16(b) liability, in any event. "Section 16(b) . . . imposes a general rule of strict liability." *Gollust*, 501 U.S. at 117. Its terms apply "irrespective of any intention on the part of" the insider. 15 U.S.C. § 78p(b). Congress recognized that Section 16(b) "would ensnare potentially innocent victims." Wang & Steinberg, *supra*, § 14:6.3. It "weighed this possibility against the abuse of inside information and concluded that the latter was the more urgent concern." *Id.* As Thomas Corcoran testified:

> You have to have a general rule. In particular transactions it might work a hardship, but those transactions that are a hardship represent the sacrifice to the necessity of having a general rule.

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[13] Underwriters may have wanted to conceal their bad-faith conduct, but that is no reason to protect them from a self-imposed risk of "indefinite liability."

Banking & Currency Comm. Hearings, 73d Cong. 6558.

II. THE COURT SHOULD APPLY LEGAL, NOT EQUITABLE, TOLLING.

A. Legal Tolling: Requiring a Section 16(a) Report to End Tolling Is Most Consistent With Congressional Intent.

Tolling of Section 16(b)'s two-year time limit properly ends when the insider discloses Section 16(a) information in the statutorily-mandated Section 16(a) filing. Tolling until the insider complies with Section 16(a) is most consistent with the text, context, purpose, and legislative history of Section 16. It is consonant with both original and continuing congressional intent. It also is the only approach that recognizes the legal tolling principles underlying Section 16 tolling, because it fully respects the insider's burden to comply with his Section 16(a) disclosure requirement. *See supra* at 17-44.

Federal courts have overwhelmingly followed this approach since 1947. *See supra* at 23, 45. It constitutes the logical tolling end point when an insider has failed to file Section 16(a) reports. It makes no sense to toll the two-year period when the insider fails to comply with Section 16(a), but end tolling despite the insider's continued noncompliance. Finally, Section 16 tolling provides a "bright-line," easy-to-apply, "mechanical" rule—precisely how Congress envisioned Section 16's "crude rule of thumb" would operate. *See supra* at 41-43.

B. Equitable Tolling: Constructive Notice of "Facts Underlying the Claim" to End Tolling Rewards Noncompliance with Section 16(a) and Lacks "Mechanical" Application.

Underwriters contend equitable tolling should end when a reasonable shareholder knows, or has reason to know, "the facts underlying the claim" as set forth in the complaint, regardless of whether the complaint sufficiently alleges facts necessary to support a Section 16(b) claim. Pet. Br. 43. Congress, however, designed Section 16 such that "the facts underlying" a Section 16(b) claim ***are*** the facts required to be disclosed in Section 16(a) reports—specific trading details, such as dates, pricing, and profits. Underwriters have never disclosed ***these*** facts, and Plaintiff is unable to allege ***these*** facts without Section 16(a) reports. No shareholder could ascertain such private trading activity without public disclosure. Yet that did not prevent Underwriters from using their disclosure violation offensively as an alternative argument for dismissal. In the district court, they argued:

> Which purchase(s)? Which sale(s)? By whom? On what date(s)? Involving how many shares? At what price(s)? Plaintiff alleges no such facts.

Dist. Ct. ECF Dkt. 57 at 22 (citing *Twombly*, 550 U.S. at 556). In the Ninth Circuit, Underwriters again argued:

> On what dates? In what amount? Simmonds pleads no facts that answer these basic questions.

9th Cir. ECF Dkt. 7083378 at 54 (citing *Twombly*, 550 U.S. at 555).

The United States, as Amicus Curiae, sets forth a similar but more specific equitable tolling approach. The Government's position is that "Section 16(b)'s two-year limitations period should be equitably tolled until a reasonably diligent security holder would have discovered the ***transaction*** that is alleged to trigger a disgorgement obligation." Br. for United States as Amicus Curiae 20 (emphasis added). Consistent with ***legal*** tolling under *Whittaker*, the Government acknowledges that proper reporting of the "transaction" in a Section 16(a) report would preclude further tolling regardless of the plaintiff's level of knowledge of the transaction. *Id.* However, the Government contends that ***equitable*** tolling principles require that tolling end—even without a Section 16(a) disclosure—in the rare circumstance that "a reasonably diligent security holder would be aware of the relevant transaction." *Id.* 20, 31.

Both Underwriters' and the Government's equitable tolling approaches constitute a variant of the Second Circuit's approach in *Litzler*. In *Litzler*, the court held that tolling should continue "only until the claimant or (depending on the circumstances) the company gets ***actual*** notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing." *Litzler*, 362 F.3d at 208 (emphasis added). The Second Circuit, however, underscored that notice means the particular plaintiff received actual "notice tantamount to a Form 4 [Section 16(a) report]." *Id.* The *Litzler* court provided three examples that would ***not*** suffice as "tantamount" to a Section 16(a) filing: "mere inquiry notice";

"circumstances in which a person would or should have realized the non-compliance"; and "the ability of a shareholder or company to piece together the substance of a Form 4 [Section 16(a) report] from disparate sources of information." *Id.* The court also summarized with approval two district court cases holding other SEC filings would not provide notice equivalent to Section 16(a) disclosure. *Id.* at 208 n.6 (citing ***Morales***, 1998 WL 314734, at *3; ***Rosen***, 179 F. Supp. 2d at 338-39).[14]

Litzler's actual notice approach creates a burden on shareholders that Congress did not envision. Congress was clear that insiders must report Section 16(a) information in Section 16(a) disclosures to allow shareholders to enforce Section 16(b). *Litzler*'s plaintiff-specific notice standard "could seriously compromise the effectiveness of Section 16(b)" because it "permits the statute of limitations to run without notification of the unreported transactions to the issuer's security holders, and therefore denies most such persons the ability to enforce Section 16(b)." Romeo & Dye, ***supra***, § 9.03[3]. *Litzler*'s suggestion that tolling could end upon notice to the ***issuer***

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[14] The district court attempted to rely on, but misapplied, the *Litzler* actual notice standard. The standard is not, as Underwriters often quote, actual notice of "the facts giving rise to [the] complaints"—especially where, as here, the plaintiff has been denied access to Section 16(a) information. *See, e.g.*, Pet. Br. 3 (quoting Pet. App. 107a). It is actual notice of Section 16(a)-specific facts themselves. *Litzler*, 362 F.3d at 208. Citing ***no*** record evidence, Underwriters distort *Litzler* when stating they "would prevail here even under the *Litzler* approach." Pet. Br. 41 n.7. To this day, no such "notice tantamount to" a Section 16(a) report is available anywhere in the public domain.

"depending on the circumstances" would further erode Section 16(b) enforcement. Issuers are controlled by the very same persons Section 16(b) targets. "Leaving insiders to police themselves" by allowing them to end tolling while shareholders remain in the dark would be "contrary to § 16(b)'s private shareholder enforcement purpose." *Mendell v. Gollust*, 909 F.2d 724, 729 (2d Cir. 1990), *aff'd* 501 U.S. 115 (1991). It "can be expected to secure the same results as those obtained when a fox guards a chicken coop." *Id.*

Contrary to Congress' goal for Section 16, *Litzler* tolling also "creates uncertainty" because actual notice depends on plaintiffs having received information "tantamount to" a Section 16(a) report. Richard Slack & Etan Mark, *For Whom the Statute of Limitations Tolls*, 16 Bus. & Secs. Litigator 6 (June 2004). This fact-intensive determination would "undoubtedly" create "additional litigation." *Id.* The Second Circuit in *Litzler* itself remanded the case to the district court for further proceedings, including potentially "trial." 362 F.3d at 208. The alleged "actual notice" was based on a letter from a shareholder to the corporate board. *Id.* at 205. The parties agreed that whatever notice this letter provided would be imputed to the bankruptcy trustee who had substituted in as the plaintiff. *Id.* at 205-06. The Second Circuit indicated that the district court (including, potentially, a jury) would have to evaluate the notice not only as to any "particulars recited" in it, but also the reliability of the "source" from which it came, to assess whether the letter was truly "tantamount to" an insider's Section 16(a) report. *Id.* at 208. Inquiring into such "uncertain determinations" of a plaintiff's knowledge was one of the many reasons why *Whittaker* chose the bright-line disclosure rule in the first place. *Whittaker*, 639 F.2d at 529.

The equitable tolling approaches advanced by Underwriters and the Government go beyond *Litzler* because both would apply a standard of ***constructive***, not actual, notice of Section 16(a) information.[15] The "uncertainty" in enforcing *Litzler*'s actual notice standard would only be exacerbated by a standard that ends tolling upon "constructive" notice of Section 16(a) information. Ending tolling based on a constructive notice rule would be inconsistent with Congress' goal of having "clear boundaries." The inquiry would not seek "objective facts." It would require courts to resolve disputes about what the notice was, where it was disseminated, who received it, when it was received, and whether it provides sufficient notice of relevant Section 16(a) facts. Such equitable tolling adjudications are "often fact-intensive," require "flexibility," and are designed precisely "for ***avoiding*** mechanical" application. *Holland v. Florida*, 130 S. Ct. 2549, 2563, 2565 (2010) (citations and quotations omitted) (remanding for "evidentiary hearing"). An added layer of process may be appropriate in certain contexts; however, Section 16 is not one of them. Congress designed Section 16's "crude rule of thumb" precisely for ***ensuring*** "mechanical" application. *See supra* at 41-43. Section 16 legal tolling serves this congressional goal. Equitable tolling does not.

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[15] Underwriters relied on *Litzler* (not *Lampf*) at the district court and Ninth Circuit levels. They did not even cite *Lampf* once. Instead, they argued tolling ends upon ***actual*** notice pursuant to *Litzler*. The "actual notice" standard was a core part of their petition for certiorari to this Court. Underwriters now premise their notice argument on "constructive" rather than "actual" notice. Underwriters literally have removed the word "actual" from the "Question Presented" on which their petition for certiorari was based. Even then, Underwriters premise their constructive notice position on something other than notice akin to a Section 16(a) filing. Section 16(a)-equivalent information remains unknown and inaccessible to Plaintiff, her attorneys, and any other non-insider shareholder—actually or constructively.

No court has applied a constructive notice, end-of-tolling rule in the 77-year history of Section 16. Although called "equitable," such a tolling approach would reward noncompliance with Section 16(a). It would create a new judicially established burden of inquiry on shareholders despite that, under Section 16(a), Congress squarely placed a duty of affirmative disclosure on insiders.

III. THESE CASES ARE TIMELY UNDER LEGAL OR EQUITABLE TOLLING.

A. Legal Tolling

Underwriters have never filed Section 16(a) reports. Plaintiff's actions, therefore, are timely under the legal tolling interpretation reflected in *Whittaker* and the many cases that have followed it.

B. Equitable Tolling

These actions also would be timely under the equitable tolling theories described by Underwriters and the Government, in any event. Underwriters cite *Merck* for the view that "equity demands reasonable diligence, assessed by what a plaintiff knew or should have known." Pet. Br. 42 (citing ***Merck***, 130 S. Ct. at 1793-94). However, the Court in *Merck* also was careful to point out that tolling ends only upon reasonable notice of the facts supporting each element of the claim. 130 S. Ct. at 1796 (tolling first prong of Section 10(b) time limit because plaintiff reasonably could not have discovered scienter). Tolling does not end upon mere "inquiry notice" or "storm warnings." *Id.* at 1797-98. It ends when a plaintiff should have reasonably discovered the facts essential to the claim. *Id.*

Insider status is an element of every Section 16(b) claim. Here, insider status is based on a group collectively owning more than 10 percent of the issuer's shares. Without Section 16(a) reports, circumstantial evidence of "group" facts was ascertainable only by a shareholder willing and able to undertake an intensive investigation, at best, in the period immediately—i.e., well within two years—before Plaintiff filed her complaints. *See supra* at 11-14. Further, Plaintiff's "[m]aximum feasible diligence" is not the standard for equitable tolling.[16] *Holland*, 130 S. Ct. at 2565 (concluding "diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence") (citations and quotations omitted).

Plaintiff's complaints are not, as Underwriters state, "based on the very same facts at issue in the high-profile IPO litigation." Pet. Br. 43. Although the IPO Litigation (and the SEC action against Credit Suisse) show Underwriters were beneficial owners of Issuer shares traded on the short-swing, neither source alleges (much less reveals) that Underwriters were Section 16 insiders. Neither source sets out evidence of the group conduct upon which Plaintiff's Section 16(b) cases are based: the underpricing-based combination among Underwriters and key Issuer decision-makers as a coordinated scheme to realize short-swing profits. *See supra* at 11-14; *see also* JA 61 (group allegations).

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[16] Without Section 16(a) disclosures, even the most diligent shareholder would be limited to circumstantial evidence.

Underwriters point out that neither the IPO Litigation plaintiffs nor the SEC alleged a Section 16 violation. Pet. Br. 9. This is true; however, it only confirms Plaintiff's point. At the time of the IPO and SEC litigation, neither the SEC nor outside shareholders and their attorneys—including the "sophisticated" "specialized" Section 16(b) "plaintiffs' bar" (Br. for Chamber of Commerce, et al. as Amici Curiae 20-21)—were aware of facts establishing Underwriters as members of a group that collectively owned more than 10 percent of Issuers' shares. Had they been aware of group facts, at least one of the thousands of legal eyes focused on the "high-profile" IPO Litigation would have asserted Section 16(b) claims against Underwriters.

Essential insider-status group facts were not known then (at least to outsiders), and there is no evidence to the contrary. Underwriters cite none. The Government cites none. The district court had none. The record before this Court contains none. Plaintiff knows of none.

Nor could such facts reasonably have been known given Underwriters' violation of their statutory obligation to report short-swing, group trading under Section 16(a). *See Holland*, 130 S. Ct. at 2562 (noting reasonably diligent plaintiff entitled to equitable tolling when "some extraordinary circumstance stood in his way") (citation and quotation omitted). Even academic scholars, who have devoted much of their careers to studying the underpricing phenomenon, were unaware of data supporting group facts. These experts were unable to publish articles on this particular facet of underpricing until years ***after*** these cases were filed ***"mainly due to the lack of data."*** Lui & Ritter, *supra*, at 2025 (emphasis added).

IV. NONE OF THE 54 CASES IS "OVER" IF THIS COURT AFFIRMS.

Underwriters proclaim that 30 of the 54 cases "are now over," Pet. Br. 12 n.1, as if this Court's decision on timeliness grounds would have no bearing on the outcome of those cases. However, affirming the Ninth Circuit on the limitations issue permits all 54 cases to proceed.

The Ninth Circuit agreed with the district court that 30 of the 54 complaints should be dismissed on the separate ground that Plaintiff's pre-suit demands (a precondition to suit under Section 16(b)) were factually insufficient, and "directed" that the district court dismiss the remaining 24 complaints on the same basis. Pet. App. 66a-68a. The Ninth Circuit "converted" the 30 dismissals, which had been "without prejudice," to dismissals "with prejudice," relying on *In re Kauffman Mut. Fund Actions*, 479 F.2d 257 (1st Cir. 1973). Pet. App. 67a.

Far from rendering the cases "over," the Ninth Circuit summarized that the decision to dismiss on account of a precondition to suit, such as pre-suit demand, is only dismissed "with prejudice" on the merits of the very "issues decided" (in *Kauffman*, demand futility; here, demand sufficiency). *Id.* Dismissal is "without prejudice" as to all other demand issues, rendering them ripe for future adjudication. *Lucas v. Lewis*, No. 09-55857, 2011 WL 1453834, at *1 (9th Cir. Apr. 15, 2011) (citing Pet. App. 66a-67a; *In re Sonus Networks, Inc.*, 499 F.3d 47, 61-63 (1st Cir. 2007)).

The cases, therefore, are not "over" in the event the Court affirms the Ninth Circuit on the limitations issue. Plaintiff would be free to either serve substantively new demands with after-acquired information in any or all of the 54 cases, or file new complaints alleging demand futility. Litigating either a new demand or demand futility would not involve re-litigating any demand issue already decided. Such proceedings therefore would be fully consistent with the Ninth Circuit's disposition (and *Kauffman*, *Sonus Networks*, and *Lucas*), and fully inconsistent with Underwriters' assertion that the cases are "now over."

CONCLUSION

Respondent respectfully requests that this Court affirm the judgment of the Ninth Circuit regarding the timeliness of these actions and remand them for further proceedings consistent with Part IV *supra*.

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REPLY
BRIEF

RECORD
AND
BRIEFS

No. 10-1261

IN THE

Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, ET AL.,

Petitioners,

v.

VANESSA SIMMONDS,

Respondent.

**On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

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INTRODUCTION

Respondent's brief is essentially a plea for this Court to rewrite the statute. Section 16(b) specifies the date on which the two-year time limit for suing begins to run: "the date [an alleged short-swing] profit was realized." 15 U.S.C. § 78p(b). Respondent asks this Court to substitute a different date: the date the defendant files a disclosure form allegedly required by Section 16(a). According to respondent, the latter date would better fulfill Section 16(b)'s "purpose." But invocation of alleged statutory "purpose" provides no license to ignore actual statutory text and structure. And that point is particularly compelling here, because Congress considered, and rejected, a proposal to use the very date that respondent proposes. Looking to statutory text, structure, and history, it is clear—as this Court has recognized—that Section 16(b) establishes a "period of repose" that is "more restrictive" than the repose periods in companion provisions of the Exchange Act. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 & n.5 (1991).

Indeed, these very lawsuits rebut respondent's basic premise. She insists that a plaintiff cannot possibly know enough to file a Section 16(b) lawsuit where the defendant has not filed a Section 16(a) disclosure, but she filed these lawsuits even though petitioners have not filed such disclosures. Nothing in law or logic authorizes courts to extend a statutory time limit under these circumstances, and nothing in respondent's brief addresses this contradiction at the very heart of her case.

ARGUMENT

I. These Actions Are Untimely Because Section 16(b) Establishes A Two-Year Repose Period That Cannot Be Extended.

Both respondent and the United States argue that the Exchange Act's text, structure, and history support characterizing Section 16(b)'s two-year time limit as a statute of limitations that can be extended, as opposed to a statute of repose that cannot. *See* Resp. Br. 17-57; U.S. Br. 9-11, 24-31. These arguments are unavailing.

A. Statutory Text Supports Repose.

Respondent is an unlikely champion of textualism, given that she is asking this Court to replace the trigger date that is actually in the statute with a different date that is not. Nonetheless, she asserts that "'typical statutes of limitations' read 'no action shall be brought ...,'" and Section 16(b) must be a statute of limitations because it uses these words. Resp. Br. 18 (quoting *Developments in the Law: Statutes of Limitations*, 63 Harv. L. Rev. 1177, 1186 (1950); brackets omitted). But "no action shall be brought" is "boilerplate language," *Jones v. Bock*, 549 U.S. 199, 200 (2007), that provides no basis for distinguishing a statute of limitations from a statute of repose. Much more telling is the nature of the *event* that triggers the statutory time limit. As the very source cited by respondent explains, "most statutes [of limitations] provide either that 'all actions ... shall be brought within' or 'no action ... shall be brought more than' so many years after '*the cause thereof accrued*.'" *Statutes of Limitations*, 63 Harv. L. Rev. at 1179 (emphasis added); *see also Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998).

Section 16(b)'s time limit, in sharp contrast, is triggered by the defendant's conduct—the classic trigger for repose. *See* Pet'rs Br. 17; *see also* Br. for U.S. as *Amicus Curiae* at 29, *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991) (No. 90-333), 1990 WL 10012716, at *29 (distinguishing between "statutes in which the limitations period runs from the time the cause of action accrued," characterized as typical limitations language, from statutes "that run[] from the date of [a] violation,'" characterized as typical repose language) (internal quotations omitted).

Respondent also argues that the statutory text negates repose because it limits the time to sue as a *remedy* for the alleged violation of a right, not the duration of the underlying *right* itself. *See* Resp. Br. 15, 17-19. But this Court has never endorsed any such rigid right/remedy distinction in this context. To the contrary, this Court has characterized various limitations on the time to sue in the Exchange Act as periods of repose. *See Lampf*, 501 U.S. at 360 & n.6. And this Court has long embraced "the rule that the creation of a right *in the same statute* that provides a limitation is some evidence that the right was meant to be limited, not just the remedy." *Beach*, 523 U.S. at 417 (citing cases). Here, the right and the limitation are not only set forth in the same statute, but in the very same subsection of Section 16(b).

The United States, for its part, argues that Section 16(b)'s text supports tolling because that provision "does not speak to the power of courts to entertain a Section 16(b) action, but instead is a traditional statute of limitations that establishes a nonjurisdictional affirmative defense." U.S. Br. 9-10.

That argument is based on a logical fallacy: just because "'a statute of limitations ... is *not* jurisdictional,'" U.S. Br. 10 (emphasis added; quoting *Day v. McDonough*, 547 U.S. 198, 205 (2006)), does not mean that a statute of repose *is* jurisdictional. A statute of repose provides a defendant immunity from suit, but need not (and typically does not) strip a court of its subject-matter jurisdiction over such a suit. Indeed, *none* of the various repose provisions in the Exchange Act, *see, e.g.*, Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c); *see also* 28 U.S.C. § 1658(b), is jurisdictional in nature.

Finally, the United States contends that the statutory text supports tolling because the word "equity" appears in both the Exchange Act's saving clause and in Section 16(b) itself. *See* U.S. Br. 11 (citing 15 U.S.C. § 78bb(a) ("the rights and remedies" under the Exchange Act "shall be in addition to any and all other rights and remedies that may exist at law or in equity"); 15 U.S.C. § 78p(b) (Section 16(b) action "may be instituted at law or in equity in any court of competent jurisdiction"). Neither of these references, however, relates to Section 16(b)'s time limit or negates repose. To the contrary, provisions of the Act that indisputably establish repose periods are subject to the *same* saving clause and contain the *same* references to a suit "at law or in equity." *See* Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c)); *see generally Lampf*, 501 U.S. at 360 & n.6.

B. Statutory Structure Supports Repose.

Both respondent and the United States argue that the structural inference that this Court found compelling in *Lampf* and *Merck & Co. v. Reynolds*, 130 S. Ct. 1784 (2010)—that the Exchange Act's two-prong time limits create periods of repose—has no bearing here, because Section 16(b) is not a two-prong time limit. *See* Resp. Br. 28-31; U.S. Br. 26-27. But the two-prong time limits enacted at the same time in the same statute shed substantial light on the proper interpretation of Section 16(b).

As an initial matter, the two-prong time limits underscore that the Congress that enacted Section 16(b) "knew perfectly well" how to trigger a time limit by reference to a plaintiff's discovery of the facts underlying her claim, *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 153 (1989), but did not do so in Section 16(b). Indeed, Congress considered and *rejected* a proposal to link the time limit for bringing a Section 16(b) claim to the filing of a Section 16(a) disclosure form. *See* Pet'rs Br. 25.

Even more telling is that the "discovery" prongs of the Exchange Act's two-prong time limits *shorten*, not *lengthen*, the time to sue. *See* Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c); *see also* 28 U.S.C. § 1658(b). Congress thereby underscored its desire to provide Exchange Act defendants with a finite end date to potential liability. *See, e.g.*, Pet'rs Br. 21-22; *see also* U.S. *Lampf* Br. 28, 1990 WL 10012716, at *28 ("[T]he fixing of a defined point of repose is an important structural component of Congress's plan for private securities law actions."). Given that Congress used a textual discovery rule to *shorten* the time to sue under the Exchange Act, the same Congress in the same statute would not have left courts free to invoke an extra-textual discovery rule to *lengthen* the time to sue under that Act.

Indeed, such an assumption would be particularly far-fetched where, as here, the two-prong provisions involve *fraud* liability, whereas Section 16(b) involves *strict* liability. The same Congress that insisted on repose for fraud claims—which by their nature involve intentional deceptive conduct—would hardly have denied repose for strict-liability claims.

The United States asserts that this Court's interpretation of Section 16(b) should be guided not by the provisions enacted at the same time in the same statute, but by Section 20A, a provision added to the Exchange Act over half a century later. *See* U.S. Br. 27-28 (citing Exchange Act § 20A, 15 U.S.C. § 78t-1, enacted as part of the Insider Trading & Securities Fraud Enforcement Act of 1988, Pub. L. 100-704, 102 Stat. 4677, 4680-81 (1988)). According to the United States, Section 20A's single-prong time limit "is not a 'statute of repose,' but an 'ordinary statute of limitations' that is no 'more potent than the usual variety,'" *id.* at 27 (quoting *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990)), and this Court should construe Section 16(b) the same way. That argument fails on at least two levels.

For one thing, the Seventh Circuit decision on which the United States bases the argument, *Short*, rejected the very analogy between Section 20A and Section 16(b) that the United States now proposes. *Short* recognized that "*[a]ll* of the express provisions in the '33 and '34 Acts (other than § 20A) are drawn as statutes of repose, and deliberately so." 908 F.2d at 1392; *see also id.* (refusing to apply § 20A time limit to implied cause of action under Rule 10b-5 in part because "Rule 10b-5 should be governed by the statute in force when Rule 10b-5 came into being").

In any event, *Short* preceded *Lampf*, in which the United States urged this Court to repudiate *Short* to the extent that decision suggested that courts could extend Section 20A's time limit. *See* U.S. *Lampf* Br. 28-30, 1990 WL 10012716, at *28-30. Based on statutory text, structure, and purpose, the United States argued in *Lampf* that Section 20A established a repose period not subject to tolling. *See id.*; *see also* Br. for U.S. as *Amicus Curiae* at 14 n.17, *Lebman v. Aktiebolaget Electrolux*, *cert. denied*, 492 U.S. 905 (1989) (No. 88-1114) ("An important component of Section 20A is its ability to guarantee repose at a predictable time."). Like the Seventh Circuit in *Short*, this Court in *Lampf* rejected the United States' invitation to look to Section 20A to interpret statutory provisions enacted over half a century earlier. *See* 501 U.S. at 361. The *Lampf* Court did not, however, dispute the United States' characterization of Section 20A as a statute of repose. *See id.* at 355 ("The Solicitor General, appearing on behalf of the Securities and Exchange Commission ... urges the application of the 5-year *statute of repose* specified in § 20A of the 1934 Act.") (emphasis added).

Rather than engaging in any real structural analysis of the Exchange Act as a whole, both respondent and the United States focus on Section 16 in isolation, and advance "purpose" arguments under the guise of "structural" arguments. In particular, they argue that tolling is necessary (1) to fulfill the purpose of Section 16(a), on the theory that otherwise a defendant would have no incentive to comply with that provision's disclosure requirements, Resp. Br. 26-27, and (2) to fulfill the purpose of Section 16(b), on the theory that otherwise a plaintiff would lack sufficient information to sue under that provision, *id.* at 19-31, 45-47; U.S. Br. 17-18, 29-31. Neither argument has merit.

First, Congress did not rely on Section 16(b) to enforce Section 16(a)'s disclosure requirements. To the contrary, Congress crafted a detailed enforcement scheme involving the Securities and Exchange Commission (SEC) and the Department of Justice. *See* Exchange Act § 21(d)(1), (2), (3), 15 U.S.C. § 78u(d)(1), (2), (3); Exchange Act § 32(a), 15 U.S.C. § 78ff(a). And intentional failures to disclose for the purpose of insider trading are violations of Rule 10b-5, subject to both private and official enforcement. *See* Pet. App. 75a (M. Smith, J., specially concurring). But Congress created no private right of action under Section 16(a), and the courts have refused to imply one. *See, e.g.*, *Scientex Corp. v. Kay*, 689 F.2d 879, 882-83 (9th Cir. 1982). Had Congress intended private enforcement to ensure compliance with Section 16(a), it could and would have authorized such enforcement directly, not through the roundabout means of Section 16(b) tolling.

Second, Congress did not rely on Section 16(a) to ensure that a Section 16(b) plaintiff would have enough information to sue. Had Congress wanted to do so, it could and would have linked the trigger date for suing under Section 16(b) to disclosure under Section 16(a). Instead, Congress specified that the two-year time limit for suing under Section 16(b) begins to run on "the date [an alleged short-swing] profit was realized." 15 U.S.C. § 78p(b). Because statutory text is the best indicator of statutory purpose, *see, e.g.*, *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992), it is ironic for respondent to claim that she seeks to effectuate Section 16(b)'s "purpose" by replacing the trigger date that is actually in the statute with a different date that is not.

At bottom, the "purpose" arguments advanced by respondent and the United States boil down to the policy argument that it makes sense to use the filing date of a Section 16(a) disclosure form as the trigger date for the two-year time limit for suing under Section 16(b). But this very case highlights a central flaw in that argument: there will always be cases, like this one, where there is (to say the least) a substantial dispute over whether a Section 16(b) defendant was required to file a Section 16(a) disclosure form at all. If the two-year time limit in Section 16(b) only began to run upon the filing of such a form, that time limit would be nullified in such cases. Indeed, under this view, the two-year time limit *still* would not have started to run in this very case, and respondent (by her own admission) *still* "could buy stocks in companies [that] had IPOs 20 years ago and bring claims for short-swing transactions if the underwriters had undervalued a stock." Pet. App. 110a. In short, the *more* far-fetched a plaintiff's theory of Section 16 liability, the *less* likely a defendant would be entitled to invoke the benefit of the statutory time limit. Neither respondent nor the United States offers any real response to this point.[1]

In any event, whatever the merits of the foregoing policy argument, it is directed to the wrong forum. Congress chose "the date [an alleged short-swing] profit was realized" to trigger the two-year time limit for suing under Section 16(b), 15 U.S.C. § 78p(b), and if respondent and the United States disagree with that choice, they are free to raise that disagreement with Congress. By choosing a repose approach with a finite date to trigger and end potential liability, Congress undoubtedly created the possibility that the time for filing a claim might lapse before a potential plaintiff learned the facts underlying such a claim. But that possibility is inherent in *any* statute of repose—including the various repose periods in the Exchange Act's fraud provisions, each of which proscribes intentional deceptive conduct. *See, e.g.*, Exchange Act § 9(e), 15 U.S.C. § 78i(f); Exchange Act § 18(c), 15 U.S.C. § 78r(c); 28 U.S.C. § 1658(b). If tolling is not necessary to fulfill the

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[1] Respondent's suggestion that petitioners could have filed protective Section 16(a) disclosure forms, *see* Resp. Br. 49, is baseless for the reasons noted in petitioners' opening brief, *see* Pet'rs Br. 37 n.6. This very case underscores the point. Respondent alleges (among multiple theories of liability) that petitioners allocated risk-free profits to issuer insiders in exchange for *future* business. *See* Resp. Br. 9-14 & 48 n.12. Given this theory of liability, it is a mystery how petitioners could have filed disclosure forms indicating that they had "realized" "any profit" "from any purchase and sale" of securities, much less specified any such "profit." 15 U.S.C. § 78p(b); *see also* Cert. Opp. App. (sample disclosure form).

"purpose" of these fraud provisions, it hardly can be deemed necessary to fulfill the "purpose" of Section 16(b). In all of these Exchange Act provisions, Congress simply balanced the costs and benefits of potentially indefinite liability, and made a classic legislative decision to extinguish liability after a finite end date *regardless* of the plaintiff's knowledge of the facts underlying a claim. While Congress could have struck a different balance, courts have no warrant to override the balance that it did strike under the guise of effectuating legislative "purpose."

C. Statutory History Supports Repose.

Although the Members of this Court have not always spoken with one voice on the proper role of legislative history in statutory interpretation, the Court has never suggested that history *rejecting* statutory language actually proves that Congress *endorsed* that language. To the contrary, as respondent herself acknowledges, "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" Resp. Br. 30-31 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987)).

Here, respondent concedes that Congress considered, and rejected, a proposal to link the time for suing under Section 16(b) to the date on which the defendant filed a Section 16(a) disclosure form. *See* Resp. Br. 29-30. Nonetheless, respondent insists that this legislative history actually *supports* her position that Congress "intended" to link the time for suing under Section 16(b) to the date on which the defendant filed a Section 16(a) disclosure form. *See* *id.* That is so, respondent asserts, because the rejected proposal involved a two-prong time limit. *See id.* at 29. According to respondent, "the two-prong limitations language *was* Congress' 'repose approach,'" so that by rejecting a two-prong time limit in Section 16(b) Congress negated any intent to establish a repose period. *Id.* at 30 (emphasis in original).

That is an unreasonable inference. Although Congress *may* adopt a two-prong time limit to preclude tolling, Congress *need* not adopt a two-prong time limit to do so. Rather, whether Congress intended to preclude tolling depends on "the text of the relevant statute," subject to ordinary canons of statutory interpretation. *United States v. Beggerly*, 524 U.S. 38, 48 (1998); *see also United States v. Brockamp*, 519 U.S. 347, 350-51 (1997). Indeed, neither *Beggerly* nor *Brockamp*, in which this Court held that courts could not extend particular statutory time limits, involved a two-prong time limit. *See* 524 U.S. at 48-49; 519 U.S. at 350-51.

Undeterred, respondent insists that the history of judicial interpretation of Section 16(b), coupled with post-enactment congressional action and inaction, supports her interpretation. *See* Resp. Br. 23, 31-36. In particular, respondent notes that most lower courts have interpreted Section 16(b)'s time limit as subject to tolling, and argues that Congress has acquiesced in this interpretation. *See id.* at 16, 32. Again, this argument is unavailing.

As a general matter, this Court has approached such "legislative acquiescence" arguments with skepticism, because there are myriad reasons why Congress may not legislate besides agreement with judicial interpretation of past legislation. *See, e.g.*, *Solid Waste Agency of N. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 169-70 (2001); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 186 (1994). Such skepticism is particularly warranted where, as here, lower-court decisions are at issue—it is one thing to posit that Congress keeps abreast of this Court's jurisprudence, and another thing altogether to posit that Congress keeps abreast of every last published and unpublished lower-court decision. *See, e.g.*, *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947) ("We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation."). Thus, this Court has not hesitated to rectify the lower courts' longstanding statutory-interpretation errors, *see, e.g.*, *McNally v. United States*, 483 U.S. 350, 358-59 (1987)—even where Congress reenacted the statute against the backdrop of such errors, *see, e.g.* *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991). Respondent's assertion that the Ninth Circuit's decision in *Whittaker v. Whittaker Corp.*, 639 F.2d 516 (9th Cir. 1981), "has achieved landmark status," Resp. Br. 31, reveals at most a lack of perspective.

Although, as respondent notes, Congress has amended Section 16(b) in the thirty years since *Whittaker* (in 2000, 2002, and 2010), *see* Resp. Br. 32, none of those amendments had anything to do with the time limit for suing. Respondent makes much of the fact that one of the amendments referred to "'judicial precedents.'" Resp. Br. 34-36 (quoting 15 U.S.C. § 78j) (added as part of the Commodity Futures Modernization Act of 2000, Pub. L. 106-554, 114 Stat. 2763A, 2763A-454 (2000)). But that amendment did not endorse the substance of any particular precedent; rather, that amendment (enacted when the Exchange Act was extended to cover swaps as well as securities) provided only that "judicial precedents" involving securities should also apply to swaps. 15 U.S.C. § 78j. The recent statutes cited by respondent are at most a species of "[p]ost-enactment legislative history," which this Court has denounced as "a contradiction in terms" that is "not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-82 (2011).

Indeed, respondent's "legislative acquiescence" argument fails on its own terms. If there were any judicial precedent in this area with which Congress is familiar, it is *Lampf*. And that decision left no doubt that Section 16(b) establishes a "period of repose" that is "more restrictive" than the repose periods in companion provisions of the Exchange Act. 501 U.S. at 360 & n.5.

* * *

Because the traditional tools of statutory interpretation—text, structure, and history—all point in the direction of repose, and thus confirm what this Court said in *Lampf*, it follows that Congress left no room for courts to extend Section 16(b)'s two-year time limit. Accordingly, the United States errs by arguing that background tolling rules allow courts to do just that. *See* U.S. Br. 7-11, 24-31. In essence, the United States advocates a "clear statement" rule that would allow courts to extend statutory time limits unless there were no other conceivable reading of the statute. But this Court rejected precisely that rule in *TRW Inc. v. Andrews*.

See 534 U.S. 19, 27-28 (2001); *see also Beggerly*, 524 U.S. at 48-49; *Brockamp*, 519 U.S. at 350-52; *Lampf*, 501 U.S. at 363. Background rules, after all, apply only "in the absence of a contrary directive from Congress," *Connors v. Hallmark & Son Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991) (R.B. Ginsburg, J.) (internal quotation omitted), and do not alter traditional canons of statutory interpretation.

Respondent goes further, arguing that courts may extend Section 16(b)'s two-year time limit *even if* that time limit is deemed to be a statute of repose. *See* Resp. Br. 36-51. But the whole point of a statute of repose, and what distinguishes it from a statute of limitations, is that it is *not* subject to extension. *See* Pet'rs Br. 17-18. It is a contradiction in terms to speak of a statute of repose that can be extended.

Respondent nonetheless insists that courts are free to extend a statute of repose if they affix the right *label* to their action. Respondent concedes, as she must, that equitable tolling does not allow courts to extend a statute of repose. *See* Resp. Br. 36-37; *see generally Lampf*, 501 U.S. at 363. But respondent posits the existence of an entirely different kind of tolling—"legal tolling"—which, in her view, allows courts to override a statute of repose. *See* Resp. Br. 36-51. Again, respondent is wrong.

Each of the cases on which respondent bases her "legal tolling" theory involves the question whether a timely filed class action tolls a statutory time limit for filing individual claims. *See* Resp. Br. 38. This Court has held that a timely filed class action tolls statutes of limitations for individual claims. *See, e.g.*, *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983); *American Pipe & Constr. Co. v. Utah*, 414

U.S. 538, 556-59 (1974). The lower courts are divided, however, on whether such tolling applies to statutes of repose. *Compare, e.g., Joseph v. Wiles*, 223 F.3d 1155, 1166-67 (10th Cir. 2000), *and Arivella v. Lucent Techs., Inc.*, 623 F. Supp. 2d 164, 176-78 (D. Mass. 2009), *with Footbridge Ltd. Trust v. Countrywide Fin. Corp.*, 770 F. Supp. 2d 618, 624-25 (S.D.N.Y. 2011), *and In re Lehman Bros. Sec. & ERISA Litig.*, No. 09 MD 02017, __ F. Supp. 2d __, 2011 WL 1453790, at *2-3 (S.D.N.Y. Apr. 13, 2011).

Although this Court has characterized *American Pipe* tolling as judge-made "equitable tolling," *see, e.g., Young v. United States*, 535 U.S. 43, 49 (2002); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990), some of the lower courts that have applied *American Pipe* tolling to statutes of repose have recharacterized it as "legal tolling." *See, e.g., Joseph*, 223 F.3d at 1167; *Arivella*, 623 F. Supp. 2d at 176. According to these courts, such tolling does not involve the application of a judge-made rule, but instead the enforcement of Rule 23 of the Federal Rules of Civil Procedure. *See, e.g., Joseph*, 223 F.3d at 1167; *Arivella*, 623 F. Supp. 2d at 176. Under this view, Rule 23 is a specific (quasi)statutory command that trumps a more general statute of repose in another statute. *See Joseph*, 223 F.3d at 1167; *Arivella*, 623 F. Supp. 2d at 176. These courts, moreover, have emphasized that *American Pipe* tolling is not inconsistent with a statute of repose, because the individual plaintiff "has effectively been a party to an action against these defendants since a class action covering him was requested but never denied." *Joseph*, 223 F.3d at 1168; *see also Arivella*, 623 F. Supp. 2d at 177.

Whatever the merits of respondent's "legal tolling" theory in the class-action context, that theory has no bearing here. Although respondent asserts that "Section 16 legal tolling is not 'extra-textual' or based on 'background rules,'" Resp. Br. 44, she identifies nothing in the statute itself that either directs or authorizes tolling. *Cf.* 28 U.S.C. § 2244(d)(2) (tolling mandated by statute); 50 App. U.S.C. § 526(a) (same). Indeed, even the Ninth Circuit's *Whittaker* decision justified Section 16(b) tolling as an application of "the traditional *equitable tolling* doctrine of fraudulent concealment." 639 F.2d at 527 n.9 (emphasis added). In contrast to the class-action situation, moreover, no action was timely filed encompassing respondent's claim. Respondent's "legal tolling" argument thus adds nothing to her overall argument that Section 16(b)'s time limit should be construed as a statute of limitations rather than a statute of repose in the first place.

II. These Actions Are Untimely Even If Section 16(b)'s Two-Year Time Limit Could Be Extended.

Even if courts had authority to extend Section 16(b)'s two-year time limit, there would be no basis to do so here. Respondent's claims accrued on "the date [an alleged short-swing] profit was realized," 15 U.S.C. § 78p(b), more than six years before she filed these actions, and no recognized tolling doctrine applies to render them timely.

As a threshold matter, the United States errs by asserting that equitable tolling applies in *any* case in which the plaintiff alleges that the defendant violated a statutory disclosure duty. And even assuming *arguendo* that tolling had any conceivable application here, respondent errs by asserting that she neither knew nor had reason to know the facts underlying her Section 16(b) claims more than two years before filing these actions. Each point is addressed in turn below.

A. Equitable Tolling Does Not Apply Here At All.

This Court has described equitable tolling as "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." *Wallace v. Kato*, 549 U.S. 384, 396 (2007); *see also Irwin*, 498 U.S. at 96 (courts apply equitable tolling "only sparingly"). Thus, equitable tolling is available "only if [the plaintiff] shows (1) that he has been pursuing his rights diligently, *and* (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2562 (2010) (emphasis added; internal quotation omitted). The doctrine requires a fact-specific inquiry that "'must be made on a case-by-case basis.'" *Id.* (quoting *Baggett v. Bullitt*, 377 U.S. 360, 375 (1964)).

The United States ignores the foregoing limitations, and instead argues that equitable tolling *categorically applies* whenever a plaintiff alleges that a defendant violated a statutory disclosure duty, *regardless* of the defendant's culpability or other relevant circumstances (although the United States acknowledges that such tolling must end when the plaintiff knew or should have known the facts underlying her claim). *See* U.S. Br. 7-8, 12-23 & n.2. Under this view, every alleged violation of a statutory disclosure duty invariably qualifies as an "extraordinary circumstance" warranting equitable tolling—regardless of whether the defendant *actually* violated such a duty, or whether any such violation was intentional. "'[T]he failure to disclose in [Section] 16(a) reports, whether intentional or inadvertent, is deemed concealment, thus triggering the traditional equitable tolling doctrine of fraudulent concealment.'" U.S. Br. 17 (quoting *Whittaker*, 639 F.2d at 527 n.9).

This approach, which would have far-reaching implications across all areas of the law, is baseless. While fraudulent concealment may qualify as an extraordinary circumstance warranting equitable tolling, *see, e.g.*, *SEC v. Gabelli*, 653 F.3d 49, 59-60 (2d Cir. 2011), not every violation of a statutory disclosure duty invariably qualifies as fraudulent concealment. Rather, as its name suggests, fraudulent concealment applies only "where the plaintiff is able to establish that the defendant took affirmative steps beyond the allegedly wrongful activity itself to conceal her activity from the plaintiff." *Id.*; *see also Wood v. Carpenter*, 101 U.S. 135, 143 (1879) ("Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."); *Magee v. Manhattan Life Ins. Co.*, 92 U.S. 93, 98-99 (1875) ("A fraudulent concealment is the suppression of something which the party is bound to disclose.... The concealment must be wilful and intentional."); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450-51 (7th Cir. 1990) (fraudulent concealment "denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time").

The United States thus errs by arguing that the alleged violation of any statutory disclosure duty invariably triggers equitable tolling. With the notable exception of the Ninth Circuit's decision in *Whittaker*, none of the authorities cited by the United States supports that sweeping proposition. To the contrary, those authorities stand only for the proposition that—notwithstanding this Court's decision in *Wood*—"mere silence" *may* be enough to establish fraudulent concealment under certain circumstances where the defendant had a duty to reveal information to the plaintiff. Thus, "courts have recognized equitable tolling when a *fiduciary* breaches a disclosure obligation." U.S. Br. 16 (emphasis added; citing John P. Dawson, *Fraudulent Concealment & Statutes of Limitation*, 31 Mich. L. Rev. 875, 888-90 (1933)). Similarly, the D.C. Circuit has applied fraudulent concealment where a statute imposed on the defendant a duty of disclosure "to the plaintiff," as opposed to the world at large. *Sprint Commc'ns Co. v. FCC*, 76 F.3d 1221, 1226 (D.C. Cir. 1996); *Smith v. Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979). The United States identifies no case other than *Whittaker* holding that the alleged violation of a statutory disclosure duty to the world at large invariably triggers fraudulent concealment.

B. Even If Equitable Tolling Applied Here, Respondent Knew Or Should Have Known The Facts Underlying Her Claims More Than Two Years Before Filing.

Finally, even if courts had authority to extend Section 16(b)'s two-year time limit, and even if there were some basis for invoking tolling here, respondent's claims still would be untimely because, as the district court noted, "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a. As the United States recognizes, courts have no authority to toll a statutory time limit after a plaintiff knows or should have known the facts underlying her claim. *See* U.S. Br. 12-23.

Respondent now denies that she knew all of the facts giving rise to her Section 16(b) claims more than two years before filing these lawsuits. *See* Resp. Br. 52-60. While respondent does not deny that the allegations of underwriter wrongdoing in the *IPO* litigation were matters of public record, she asserts that she was unaware of the facts underlying one specific element of Section 16(b) liability—that underwriters allegedly conspired with issuer insiders (and thereby formed a "group") to underprice IPO shares to allow the insiders to reap substantial profits, a portion of which they would later kick back to the underwriters in the form of additional business. *See id.* at 12. That particular element of liability, respondent argues, was unknown until her attorneys "pieced it together" less than two years before filing these lawsuits. *Id.* at 12-13. That argument fails on at least two levels.

First, the theory that underwriters conspired with issuer insiders to underprice IPO shares was at the very *heart* of the *IPO* litigation, which (unlike this case) involved claims against *both* underwriters and issuer insiders. *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 300-14 (S.D.N.Y. 2003).

In addition, the academic literature addressed this theory before 2005: respondent herself presented the district court with a 2004 article that advanced this theory, and formed the basis for the later articles that respondent cites in her brief. *See* Tim Loughran & Jay Ritter, *Why Has IPO Underpricing Changed Over Time?*, 33 Fin. Mgmt. 5 (Autumn 2004), JA68-140.

Second, even if the alleged underpricing conspiracy between underwriters and issuer insiders were reasonably unknowable before 2005, many of the *other* theories on which respondent based these Section 16(b) actions (*e.g.*, "lock-up," "laddering," *see* JA58-62) were not. Respondent seems to think that if she can identify just *one* new theory underlying an element of liability in her complaint, that would justify her delay in filing the entire action. The law, however, is precisely the opposite. As long as a plaintiff knows, or should know, that she has been injured (regardless of the *legal theory* of liability), she may not sleep on her rights. *See, e.g.*, *Rotella v. Wood*, 528 U.S. 549, 555-56 (2000).

At the end of the day, this Court need not second-guess the district court's observation that "there is no dispute that all of the facts giving rise to [respondent's] complaints against [petitioners] were known to the shareholders of the Issuer Defendants for at least five years before these cases were filed." Pet. App. 107a. The United States does not challenge the district court's conclusion regarding shareholder knowledge, but suggests that a remand is warranted because "[t]he *court of appeals* ... did not conduct the correct inquiry into when a reasonably diligent security holder would have discovered the information on which respondent's Section 16(b) claims are based." U.S. Br. 24 (emphasis added). But a remand would be pointless where, as here, the district court already considered that very question, and correctly concluded that petitioners are entitled to judgment as a matter of law on the undisputed facts.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

October 26, 2011

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AMICUS
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QUESTION PRESENTED

Whether and under what circumstances the two-year time limit for bringing an action to recover insiders' short-swing trading profits pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), may be tolled for equitable reasons.

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In the Supreme Court of the United States

No. 10-1261

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v.

VANESSA SIMMONDS

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FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING NEITHER PARTY

INTEREST OF THE UNITED STATES

The United States, through the Department of Justice and the Securities and Exchange Commission (SEC), administers and enforces the federal securities laws. The question presented in this case is whether and under what circumstances the two-year time limit for filing suit to recover insiders' short-swing trading profits pursuant to Section 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78p(b), may be tolled for equitable reasons. Because Section 16(b) protects against the misuse of inside information in the securities markets, the United States has a substantial interest in this Court's resolution of the question presented.

STATEMENT

1. In enacting the Securities Exchange Act of 1934 (1934 Act), "Congress recognized that insiders may have access to information about their corporations not available to the rest of the investing public." *Foremost-McKesson, Inc.* v. *Provident Sec. Co.*, 423 U.S. 232, 243 (1976). Congress further recognized that, "[b]y trading on this information," corporate insiders "could reap profits at the expense of less well informed investors." *Ibid.* Congress attempted to protect outside investors and the markets against such insider trading by (a) requiring insiders to report their transactions in the company's securities and (b) providing for disgorgement of short-swing profits from such transactions under specified circumstances.

a. Section 16(a) of the 1934 Act applies to "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security * * * , or who is a director or an officer of the issuer of such security." 15 U.S.C. 78p(a)(1). Those insiders must file a disclosure statement with the SEC on a report called Form 4 when they purchase or sell securities of the relevant issuer. See 15 U.S.C. 78p(a)(2)(C); 17 C.F.R. 240.16a-3(a). Because statements filed with the SEC pursuant to Section 16(a) are made available to the public, see 15 U.S.C. 78p(a)(4); 4 Thomas Lee Hazen, *Treatise on the Law of Securities Regulation* § 13.1, at 558-559 (6th ed. 2009) (Hazen), Section 16(a) alerts investors to transactions by beneficial owners, directors, and officers in the shares of their company.

b. In Section 16(b), Congress required the beneficial owners, directors, and officers subject to Section 16(a)'s reporting requirements to disgorge any profits they received from "short-swing" transactions. Section 16(b) applies to "any profit realized by [an issuer's covered insider] from any purchase and sale, or any sale and purchase, of any equity security of such issuer * * * within any period of less than six months." 15 U.S.C. 78p(b). Section 16(b) "imposes a form of strict liability" on beneficial owners, directors, and officers, requiring them "to disgorge their profits even if they did not trade on inside information or intend to profit on the basis of such information." *Gollust* v. *Mendell*, 501 U.S. 115, 122 (1991).

Unlike most of the federal securities laws, Section 16(b) "rel[ies] solely on the issuers of stock and their security holders" and "does not confer enforcement authority on the [SEC]." *Gollust*, 501 U.S. at 122. Section 16(b) provides that a suit to recover short-swing profits "may be instituted at law or in equity * * * by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter." 15 U.S.C. 78p(b). Section 16(b) also limits the time period for bringing an action to recover short-swing profits. In the provision directly at issue in this case, Section 16(b) states that "no such suit shall be brought more than two years after the date such profit was realized." *Ibid.*

2. a. This case stems from Initial Public Offerings (IPOs) of equity securities during the stock market boom of 1998 to 2000. In 2001, after the bubble had burst, thousands of investors filed class actions against 55 underwriters (including petitioners here), 310 issuers, and hundreds of individual officers, alleging that the defendants had engaged in a scheme to defraud the in-

vesting public in violation of federal securities laws. See *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 27 (2d Cir. 2006) (*IPO*), clarifying decision on denial of reh'g, 483 F.3d 70 (2d Cir. 2007).

The *IPO* plaintiffs alleged that the underwriters had artificially inflated the price of the issuers' securities in three ways. First, the underwriters allegedly entered into "[t]ie-[i]n agreements" with customers—*i.e.*, agreements that required customers who received an allocation of shares in an IPO to purchase additional shares in the aftermarket, typically at progressively higher prices (a practice known as "laddering"). *IPO*, 471 F.3d at 27. Second, the underwriters allegedly required customers who received IPO allocations to pay various forms of undisclosed compensation, including inflated brokerage commissions on IPO securities, commissions on unnecessary transactions in unrelated securities, and purchases of other unwanted securities. *Ibid.* Third, the underwriters allegedly encouraged their analysts to manipulate the securities' prices. *Ibid.* The *IPO* plaintiffs claimed that these practices rendered the underwriters liable under Sections 11 and 15 of the Securities Act of 1933, 15 U.S.C. 77k and 77*o*, as well as Sections 10(b) and 20(a) of the 1934 Act, 15 U.S.C. 78j and 78t. *Id.* at 28.

The underwriters' conduct also was challenged under the antitrust laws. In January 2002, a group of investors filed antitrust actions against ten investment banks (including some of the petitioners here), alleging that they had formed underwriting syndicates in order to impose harmful conditions on IPO customers. See *Credit Suisse Sec. (USA) LLC* v. *Billing*, 551 U.S. 264, 269 (2007). According to the antitrust plaintiffs, those conditions consisted of two of the types of conduct at issue in the

IPO securities litigation: tie-in or laddering agreements, and the extraction of undisclosed compensation in return for IPO allocations. *Id.* at 269-270. In *Billing*, however, this Court held that the securities laws impliedly precluded the imposition of antitrust liability for the underwriters' conduct. *Id.* at 284.

b. The plaintiff in this case (respondent in this Court) has asserted a different legal challenge to the underwriters' conduct. Respondent owns stock in 54 companies that conducted IPOs in 1999 or 2000, see Pet. App. 82a, and she brought 54 virtually identical actions under Section 16(b) of the 1934 Act. The complaints alleged that petitioners—the investment bank or banks that underwrote the IPO at issue in each action—had "created the opportunity for themselves to directly and indirectly profit or share in any profits derived from transactions" in the IPO allocation and aftermarket. See 2:07-cv-01549 Docket entry No. 11, at 4 (W.D. Wash. Feb. 25, 2008) (Onvia Compl.). According to respondent, petitioners had artificially inflated stock prices by underpricing the IPO securities, entering into laddering agreements with customers, and entering into lock-up agreements that prevented the sale of the securities for six months from the IPO date. *Id.* at 5-6.

Respondent alleged that, as a result of those practices, petitioners formed a "group" with the principal shareholders, directors, and officers of each company. Onvia Compl. 7; see 15 U.S.C. 78m(d) (establishing group ownership requirements); 17 C.F.R. 240.13d-5 (same). According to respondent, each group "beneficially owned in excess of 10 percent" of the relevant company's outstanding stock, which subjected the group to the requirements of Section 16(a) and (b). Onvia Compl. 7-8. Respondent contended that petitioners were liable under Section 16(b) for profiting in various ways when their customers and other group members—*i.e.*, the shareholders, directors, and officers who received IPO shares—engaged in short-swing transactions. *Id.* at 8. Respondent further alleged that petitioners were liable under Section 16(a) for failing to report the short-swing transactions from which they had allegedly profited. *Id.* at 8-9.

3. The district court dismissed all 54 complaints. Pet. App. 78a-111a. As relevant here, the court dismissed 24 of the complaints on the ground that they were brought outside the two-year limitations period in Section 16(b). *Id.* at 105a-110a.[1] The court recognized that the limitations period could be equitably tolled. *Id.* at 105a. It held, however, that tolling was inappropriate here because "the Issuer Defendants' shareholders were fully advised of the facts giving rise to [respondent's] claim well over five years before [respondent] filed these actions." *Ibid.*; see *id.* at 107a ("The only recent development giving rise to these claims is [respondent's] acquisition of shares in the 54 Issuer Defendants' companies.").

4. a. The court of appeals reversed in relevant part. Pet. App. 1a-75a. The court held that, under its prior decision in ***Whittaker* v. *Whittaker Corp.***, 639 F.2d 516 (9th Cir.), cert. denied, 454 U.S. 1031 (1981), the two-year limitations period in Section 16(b) "is tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue." Pet. App. 63a. Be-

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[1] The district court dismissed the other 30 complaints on the ground that respondent's demand letters to the issuers were inadequate. Pet. App. 94a-102a; see 15 U.S.C. 78p(b) (requiring a security holder to request that the issuer bring suit before initiating an action).

cause "[respondent] alleges that [petitioners] did not file any Section 16(a) reports," the court concluded that "[respondent's] claims are not time-barred." *Id.* at 66a.

b. In addition to authoring the panel opinion, Judge Milan D. Smith, Jr. filed a separate concurring opinion. Pet. App. 72a-75a. He would have read Section 16(b) as establishing "a firm bar against Section 16(b) suits filed more than two years after the transaction is completed." *Id.* at 72a. He agreed with the other panel members, however, that respondent's suit was timely under the court's prior decision in *Whittaker*. *Id.* at 75a.

SUMMARY OF ARGUMENT

A. Section 16(b) of the Securities Exchange Act of 1934, which provides that a suit to recover certain short-swing trading profits shall be brought within two years of the date those profits are realized, is an ordinary statute of limitations. Like any such federal statute of limitations, it is "normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). That presumption is strengthened in this context, because Section 16(b) and related provisions of the securities laws expressly preserve room for the operation of traditional equitable doctrines.

B. This Court has long recognized that equity tolls a statute of limitations when the defendant has misrepresented or wrongfully concealed facts essential to the plaintiff's cause of action. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 397 (1946). That rule applies where, as in this case, insiders are alleged to have concealed short-swing transactions by breaching an independent legal duty to report those transactions under

Section 16(a). In that circumstance, Section 16(b)'s limitations period should be tolled until a reasonably diligent security holder knows or should know the facts that would form the basis of a short-swing claim. Although a Section 16(a) report will usually provide the first public notice that a short-swing transaction has occurred, that information may come to light in other ways as well. The court of appeals therefore erred in holding that, as a matter of equity, the statute is invariably tolled until a Section 16(a) report is filed.

C. Petitioners' various arguments for treating Section 16(b) as a statute of repose do not overcome the background presumption that equitable tolling applies. First, the text of Section 16(b), like a typical federal statute of limitations, establishes a time period for bringing suit but does not address the operation of traditional equitable doctrines. Second, the text and structure of Section 16(b) are wholly different from other statutory time limits that this Court has found not to be subject to equitable tolling. Third, the unenacted version of Section 16(b) on which petitioners rely (Br. 25) only demonstrates that the House of Representatives declined to adopt the type of provision that is used elsewhere in the securities laws to create a period of repose. Finally, the core purposes of Section 16(b) would be defeated if its limitations period could run while insiders fail to file Section 16(a) reports, conceal their short-swing transactions, and thereby insulate themselves from liability.

ARGUMENT

SECTION 16(b)'S TWO-YEAR LIMITATIONS PERIOD IS EQUITABLY TOLLED UNTIL A REASONABLY DILIGENT SECURITY HOLDER KNOWS OR SHOULD KNOW THE FACTS UNDERLYING HIS CLAIM

Section 16(b) provides that no suit to recover profits from beneficial owners, directors, or officers who have engaged in short-swing transactions "shall be brought more than two years after the date such profit was realized." 15 U.S.C. 78p(b). Neither Section 16(b) itself nor the surrounding provisions of the 1934 Act establish an exception to the usual background rule that limitations periods for commencing suit are subject to equitable tolling. The court of appeals erred, however, in holding categorically that the limitations period could not begin to run until petitioners filed the disclosure statements allegedly required by Section 16(a). Although Section 16(a) statements perform an important role in alerting investors to transactions for which Section 16(b) requires disgorgement of profits, they are not the only potential source of such information. If other public disclosures adequately inform security holders that particular transactions have occurred, further tolling of the time for bringing suit to disgorge profits from those transactions is unwarranted, even if no Section 16(a) statement has been filed.

A. Section 16(b)'s Limitations Period Is Subject To Equitable Tolling

1. Section 16(b) states that "no * * * suit" to recover insider trading profits "shall be brought more than two years after the date such profit was realized." That requirement does not speak to the power of courts to entertain a Section 16(b) action, but instead is a tradi-

tional statute of limitations that establishes a nonjurisdictional affirmative defense. See *Day* v. *McDonough*, 547 U.S. 198, 205 (2006) ("A statute of limitations defense * * * is not jurisdictional.") (internal quotation marks omitted); see also *Holland* v. *Florida*, 130 S. Ct. 2549, 2560 (2010) (explaining that 28 U.S.C. 2244(d)'s one-year time limit for state prisoners to file habeas petitions "does not set forth 'an inflexible rule requiring dismissal whenever' its 'clock has run'") (quoting *Day*, 547 U.S. at 208). Whereas federal courts "must raise and decide jurisdictional questions that the parties either overlook or elect not to press," *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1202 (2011), statutes of limitations are generally "subject to rules of forfeiture and waiver," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008) (*John R. Sand*); see *Day*, 547 U.S. at 213 (Scalia, J., dissenting) ("[T]he enactment of time-limitations periods * * * , without further elaboration, produces defenses that are nonjurisdictional and thus subject to waiver and forfeiture.").

2. In addition to being waivable and forfeitable, "a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'" *Holland*, 130 S. Ct. at 2560 (quoting *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)); see *John R. Sand*, 552 U.S. at 133 (explaining that statutes of limitations "typically permit courts to toll the limitations period in light of special equitable circumstances"); *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 27 (1989) (noting that statutes of limitations are "traditionally subject to equitable tolling"); *Honda* v. *Clark*, 386 U.S. 484, 501 (1967) (applying a "traditional equitable tolling principle" to a statute of limitations contained in the Trading with the Enemy

Act, 50 U.S.C. App. § 34, at 1039); *Bailey* v. *Glover*, 88 U.S. (21 Wall.) 342, 349 (1875) (applying equitable tolling to a federal bankruptcy statute of limitations). Indeed, the Court has described it as "hornbook law that limitations periods are customarily subject to equitable tolling." *Young* v. *United States*, 535 U.S. 43, 49 (2002) (internal quotation marks and citation omitted).

With respect to Section 16(b), "the presumption's strength is reinforced by the fact" that Congress preserved room for the operation of traditional equitable doctrines under the federal securities laws. *Holland*, 130 S. Ct. at 2560 (internal quotation marks omitted). "When Congress passed the Securities Act of 1933 and the Securities Exchange Act of 1934, it did not specifically indicate what effect the statutory scheme should have upon equitable defenses formerly available in securities actions." Alice R. Belair, *Securities Actions: Equitable Defenses and the Good Faith Defense for "Controlling Persons,"* 44 Fordham L. Rev. 1173, 1173 (1976) (footnotes omitted). Congress did, however, provide that "the rights and remedies" supplied by the Acts "shall be in addition to any and all other rights and remedies that may exist at law or *in equity*." 15 U.S.C. 78bb(a) (emphasis added); accord 15 U.S.C. 77p. And Section 16(b) itself provides that a suit to recover an insider's short-swing profits "may be instituted at law or *in equity* in any court of competent jurisdiction." 15 U.S.C. 78p(b) (emphasis added). Thus, to the extent that Section 16(b) addresses the question, it reinforces the presumption of equitable tolling previously recognized at common law, see *Bailey*, *supra*.

B. Section 16(b)'s Limitations Period Is Equitably Tolled Until A Reasonably Diligent Security Holder Knows Or Should Know The Facts Underlying His Claim

This Court has long recognized that equity tolls a statute of limitations when the defendant misrepresents or wrongfully conceals facts essential to the plaintiff's cause of action. See, *e.g.*, *Holmberg* v. *Armbrecht*, 327 U.S. 392, 393, 397 (1946). That rule applies where, as in this case, insiders are alleged to have concealed their short-swing transactions by breaching an independent legal duty to file reports under Section 16(a). In that circumstance, Section 16(b)'s limitations period should be tolled until a reasonably diligent security holder knows or should know the facts that would form the basis of a short-swing claim. Although a report filed under Section 16(a) will usually provide the first public notice that a short-swing transaction has occurred, such transactions may come to light through other means as well. The court of appeals therefore erred in holding that, as a matter of equity, the statute is always tolled until the filing of a Section 16(a) report.

1. *Equity tolls the limitations period until a reasonably diligent security holder knows or should know the facts underlying his short-swing claim*

a. This Court has repeatedly recognized that "equity tolls the statute of limitations in cases of fraud and concealment." *TRW Inc.* v. *Andrews*, 534 U.S. 19, 27 (2001) (*TRW*); see *id.* at 37 (Scalia, J., concurring in the judgment) (recognizing "the historical exception for suits based on fraud"). More generally, the Court has "allowed equitable tolling in situations * * * where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Irwin*, 498 U.S. at 96. The principle that a limitations period is presumptively tolled when a defendant has wrongfully concealed his alleged misconduct from a potential plaintiff, or has otherwise improperly hindered a plaintiff's effort to commence suit in a timely manner, derives from the equitable maxim that a party should not be permitted to benefit from its own misconduct. See, *e.g.*, *Glus* v. *Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232-233 (1959) ("[W]e need look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.") (footnote omitted). This Court has long held as a matter of equity that a defendant cannot use his own misconduct as a defense, including by unfairly relying on a statute of limitations.

Section 16(b)'s disgorgement requirement does not depend on proof that the defendant acted with fraudulent or otherwise wrongful intent. But the principle that "equity tolls the statute of limitations in cases of fraud and concealment," *TRW*, 534 U.S. at 27, is not limited to suits in which the plaintiff's *underlying cause of action* is based on fraud. Rather, it applies more broadly to cases in which a defendant misrepresents or wrongfully conceals facts essential to the plaintiff's cause of action, regardless of the nature of the underlying claim. The Court in *TRW* relied (see *ibid.*) on its decision in *Holmberg*, which was a suit to recover for a bank's liability against a shareholder. See 327 U.S. at 393. The plaintiffs in *Holmberg* alleged that the defendant had concealed his ownership of stock, and had thereby avoided the statutory liability, by holding the stock in the name of another person. See *ibid.* Although the Court held that the limitations period could be tolled in those circumstances, see *id.* at 396-397, its description of the plaintiffs' statutory cause of action (see *id.* at 393 & n.1) did not suggest that proof of fraud or deceit was an element of the underlying claim. Similarly in *Glus*, the Court applied equitable-tolling principles to a suit under the Federal Employers' Liability Act, 45 U.S.C. 51 *et seq.*, based on the defendants' alleged use of deceit to induce the plaintiff to allow the statutory deadline to pass. See 359 U.S. at 232-235.

To be sure, tolling may often be applied in cases where the plaintiff's underlying claim is based on fraud, since the same misrepresentation that gives rise to the plaintiff's cause of action may also prevent the plaintiff from knowing that he has been defrauded. See, *e.g.*, *Exploration Co.* v. *United States*, 247 U.S. 435, 445-446 (1918) (suit to annul patents procured by fraud). The logic of the equitable-tolling doctrine, however, applies whenever a defendant misrepresents or wrongfully conceals facts essential to the plaintiff's cause of action. Whether or not the plaintiff's cause of action is based on fraud, permitting the defendant to obtain a statute-of-limitations dismissal in that manner would allow him to profit from his own misconduct.

In the limitations context, the Court has sometimes described the doctrine as one of "discovery"—*i.e.*, a rule that a cause of action does not accrue "until the plaintiff has 'discovered' it." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1793 (2010). That doctrine arose in fraud and concealment cases "as an exception to the general limitations rule that a cause of action accrues once a plaintiff has a 'complete and present cause of action.'" *Ibid.* (quoting *Bay Area Laundry & Dry Cleaning Pension*

Trust Fund v. *Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997)). That discovery rule is best understood as an application of more general tolling principles to cases involving fraud or concealment. Courts have recognized various reasons for exercising their equitable authority to toll a limitations period, and they have recognized in particular that "a defendant's deceptive conduct may prevent a plaintiff from even *knowing* that he or she has been defrauded." *Ibid.* "[T]he bar of the statute," this Court has therefore explained, "does not begin to run" until the deceptive conduct is discovered. *Holmberg*, 327 U.S. at 397 (quoting *Bailey*, 88 U.S. (21 Wall.) at 348). But whether the doctrine is described in terms of the running of the limitations period or of the accrual of the plaintiff's cause of action, its legal effect is the same. When a defendant has misrepresented or wrongfully concealed facts essential to the plaintiff's cause of action, a statutory time limit on bringing suit commences when the relevant information is discovered or should have been discovered by a reasonably diligent plaintiff.[2]

b. Such misrepresentation or concealment can occur, of course, through affirmative conduct that misstates material facts or conveys a misimpression regarding those facts. Tolling may also be appropriate, however, when a defendant breaches an independent legal duty of disclosure. See, *e.g.*, John P. Dawson, *Fraudulent Concealment and Statutes of Limitation*, 31 Mich. L. Rev. 875, 887 (1933) (Dawson) ("The absence of direct misrepresentation is supplied by an affirmative obligation to make full disclosure."); *Chiarella* v. *United States*, 445 U.S. 222, 230 (1980) (holding that "silence in connection with the purchase or sale of securities may operate as a fraud actionable under [Section] 10(b)" of the 1934 Act, but "[s]uch liability is premised upon a duty to disclose"); American Law Inst., *Federal Securities Code* § 202(61)(B) (1980) ("Inaction or silence when there is a duty to act or speak may be a fraudulent act.").

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[2] Federal courts "generally apply a discovery accrual rule when a statute is silent on the issue." *Rotella* v. *Wood*, 528 U.S. 549, 555 (2000). This Court has not decided, however, to what extent a discovery rule applies beyond cases in which a defendant has misrepresented or wrongfully concealed facts essential to the plaintiff's cause of action. See *TRW*, 534 U.S. at 27. This case presents no occasion to decide that question, because on any approach to the discovery rule, concealment of material information in violation of a statutory duty to disclose is sufficient to toll an applicable statute of limitations.

When the law imposes a duty to disclose information, the defendant's breach of that duty ordinarily tolls an applicable statute of limitations if the breach prevents the plaintiff from learning facts necessary to the assertion of his claim. See Dawson 888-890 (noting that courts have recognized equitable tolling when a fiduciary breaches a disclosure obligation); see also *Sprint Commc'ns Co.* v. *FCC*, 76 F.3d 1221, 1226-1227 (D.C. Cir. 1996) ("Silence does toll the statute of limitations, however, if the defendant has an affirmative duty to disclose," including "a statutory duty to disclose the relevant information."); *Smith* v. *Nixon*, 606 F.2d 1183, 1190 (D.C. Cir. 1979) (holding that the government's breach of its statutory duty to disclose unauthorized wiretapping tolls the statute of limitations for damages claims), cert. denied, 453 U.S. 912 (1981); cf. *Connors* v. *Hallmark & Son Coal Co.*, 935 F.2d 336, 342, 343 (D.C. Cir. 1991) (R.B. Ginsburg, J.) ("[B]reach of the employers' contractual obligations to contribute and report seems likely to be a hidden injury, similar to the type of injury that has long triggered the discovery rule.").

An insider's failure to file a report in violation of Section 16(a) is the type of unlawful concealment that has traditionally tolled applicable limitations periods. Indeed, the case for tolling is particularly strong in this context because a core purpose of Section 16(a) is to "provid[e] information which will serve as the basis for a claim under section 16(b)." Michael J. Kaufman, *Securities Litigation: Damages* 8:7 (2001); see *Reliance Elec. Co.* v. *Emerson Elec. Co.*, 404 U.S. 418, 426 (1972) (explaining that this Court has "[r]ecognized the interrelatedness of [Section] 16(a) and [Section] 16(b)"). Congress's objectives in enacting Section 16(b) "would be thwarted if insiders could escape liability by not reporting as required under [Section] 16(a)." *Whittaker* v. *Whittaker Corp.*, 639 F.2d 516, 528 (9th Cir.), cert. denied, 454 U.S. 1031 (1981). The rule that petitioners advocate thus would not simply allow violators of Section 16(a) to profit from their own wrongs; it would allow them to derive precisely the wrongful insulation from suit that Section 16(a) was intended to prevent.

In most instances, a potential Section 16(b) plaintiff will have no way of knowing that an insider has engaged in a short-swing transaction if no Section 16(a) report is filed. For that reason, courts and commentators have recognized that "[t]he failure to disclose in [Section] 16(a) reports, whether intentional or inadvertent, is deemed concealment, thus triggering the traditional equitable tolling doctrine of fraudulent concealment." *Whittaker*, 639 F.2d at 527 n.9; see *Litzler* v. *CC Invs., L.D.C.*, 362 F.3d 203, 208 (2d Cir. 2004) ("[T]he incentives of Section 16 are best served if tolling is triggered by noncompliance with the disclosure requirements of Section 16(a) through failure to file a Form 4."); Donald C. Cook and Myer Feldman, *Insider Trading Under the*

Securities Exchange Act, 66 Harv. L. Rev. 385, 413 (1953) ("Concealment of [a short-swing transaction], whether intentional or inadvertent, effectively prevents suit and demands the mitigating construction of the statute of limitations given by courts in other contexts.") (internal quotation marks omitted).

Petitioners contend (Br. 35-36) that they had no duty to disclose the transactions at issue because they were not, "directly or indirectly, the beneficial owner[s] of more than 10 percent of" the relevant securities. 15 U.S.C. 78p(a). That argument is not relevant, however, to the proper application of Section 16(b)'s timing requirement at this stage of the case. Petitioners properly raised their statute-of-limitations defense in a motion to dismiss. See Pet. App. 40a-41a; Fed. R. Civ. P. 8(c)(1), 12(b)(6); *John R. Sand.*, 552 U.S. at 133. In ruling on petitioners' limitations defense, the district court therefore was required to take as true the facts alleged in respondent's complaints. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 249 (2009). The court was thus required to assume, in determining whether Section 16(b)'s limitations period should be tolled, that petitioners were members of groups that "beneficially owned in excess of 10 percent" of various publicly traded securities, and that petitioners profited when their customers and other group members—*i.e.*, the shareholders, directors, and officers who received IPO shares—engaged in short-swing transactions. Onvia Compl. 7-8.

Respondent's allegations in support of her Section 16(b) claim for disgorgement thus encompassed all of the facts necessary to establish petitioners' obligation to disclose the transactions under Section 16(a). That overlap is not coincidental. Section 16(b)'s disgorgement requirement applies to short-swing trades made by "*such* beneficial owner[s], director[s], or officer[s]," 15 U.S.C. 78p(b) (emphasis added)—*i.e.*, the same owners, directors, and officers who are described in Section 16(a). If the allegations in a Section 16(b) suit are sufficient to survive a motion to dismiss on the merits, they are sufficient to require the court to assume, at that threshold stage of the suit, that the defendant was obligated to disclose the transactions in a Section 16(a) report. Indeed, petitioners do not contend that an insider's short-swing trade can trigger Section 16(b)'s disgorgement obligation without triggering Section 16(a)'s reporting requirement. And it is undisputed that petitioners have never filed Section 16(a) reports with respect to the transactions at issue here.

2. *Equity does not invariably toll the limitations period until the filing of a Section 16(a) report*

a. For the foregoing reasons, respondent's complaints alleged facts sufficient to warrant some tolling of Section 16(b)'s limitations period. That equitable tolling ceases, however, "when the litigant first knows or with due diligence should know facts that will form the basis for an action." *Merck*, 130 S. Ct. at 1794 (quoting 2 Calvin Corman, *Limitation of Actions* § 11.1.1, at 134 (1991 & 1993 Supp.)). As this Court explained in *Merck*, the historical exception in equity for cases of fraud or concealment prevents the limitations period from running until the plaintiff actually discovers the relevant facts or until a reasonably diligent plaintiff should have discovered those facts. *Id.* at 1793-1794; see, *e.g.*, *Holmberg*, 327 U.S. at 397 (limitations period may be tolled "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part") (internal quotation marks omitted).

Courts have long treated that principle as an integral feature of the discovery rule. This Court recognized in *Merck* that, "for more than a century, courts have understood that '[f]raud is deemed to be discovered . . . when, in the exercise of reasonable diligence, it could have been discovered.'" 130 S. Ct. at 1794 (quoting 2 Horace G. Wood, *Limitation of Actions* § 276b(11), at 1402 (4th ed. 1916)); see *Kirby* v. *Lake Shore & Mich. S. R.R. Co.*, 120 U.S. 130, 138 (1887) (stating that the discovery rule "regard[s] the cause of action as having accrued at the time the fraud was or should have been discovered"). State and federal courts have interpreted the discovery rule "to refer not only to actual discovery, but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know." *Merck*, 130 S. Ct. at 1794. And as the *Merck* Court explained, commentators have understood the doctrine to operate in the same way. See *ibid.* (citing Corman, *supra*, § 11.1.1, at 134, and 37 Am. Jur. 2d, *Fraud and Deceit* § 347, at 354 (2001 & Supp. 2009)).

Accordingly, Section 16(b)'s two-year limitations period should be equitably tolled until a reasonably diligent security holder would have discovered the transaction that is alleged to trigger a disgorgement obligation. The filing of a Section 16(a) report that accurately discloses the transaction will preclude further tolling, whether or not a particular plaintiff had actual knowledge that the report was submitted. But even without a Section 16(a) disclosure, circumstances may arise in which a reasonably diligent security holder would be aware of the relevant transaction. At that point, the security holder is charged with knowing the facts that would form the basis for his action, see *Merck*, 130 S. Ct. at 1794, and he has two years to bring an action to recover any short-swing profits. That approach balances the need for effective enforcement of the disgorgement obligation for short-swing profits with the need for finality on long-settled transactions, in a manner that comports with the background rules that have historically governed the application of statutory limitations periods.[3]

b. Relying on its previous decision in *Whittaker*, the court of appeals held that the two-year limitations period in Section 16(b) "is tolled until the insider discloses his transactions in a Section 16(a) filing, regardless of whether the plaintiff knew or should have known of the conduct at issue." Pet. App. 63a. That approach is inconsistent with the background rules described above. In cases where a statute of limitations is tolled due to the defendant's wrongful concealment of facts essential to the plaintiff's cause of action, tolling traditionally continues not until the *defendant* abandons its efforts at concealment, but only until the *plaintiff* learns or reasonably should learn the relevant facts. When insiders' short-swing transactions are disclosed to the public through some source other than a Section 16(a) report, neither traditional equitable principles nor common sense supports "permit[ting] plaintiffs who know of the defendant's pattern of activity simply to wait, 'sleeping on their rights,'" perhaps bringing suit long after the transactions at issue have been completed. *Klehr* v. *A.O. Smith Corp.*, 521 U.S. 179, 187 (1997) (quoting *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 352 (1983)).

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[3] Because security holders have "the ultimate authority to sue for enforcement of [Section] 16(b)," *Gollust* v. *Mendell*, 501 U.S. 115, 122 (1991) it is their knowledge of facts, and not the issuer's knowledge, that determines the running of the limitations period. Security holders have the right to bring suit under Section 16(b) precisely to prevent "concerted action" between the issuer and the insiders whose profits are sought to be recovered. *Park & Tilford, Inc.* v. *Schulte*, 160 F.2d 984, 988 (2d Cir.), cert. denied, 332 U.S. 761 (1947). Looking to the issuer's knowledge would enable "[c]ollusion among insiders and, a more likely occurrence, the unarticulated acquiescence in or averting of gaze from a powerful insider's transactions." *Whittaker*, 639 F.2d at 529.

In *Whittaker*, the court of appeals rejected a standard of actual or constructive notice on the ground that such an inquiry would require "uncertain determinations of what knowledge" should be attributed to investors or issuers. 639 F.2d at 529. In applying various limitations periods, however, state and federal courts have long looked "not only to actual discovery, but also to the hypothetical discovery of facts a reasonably diligent plaintiff would know." *Merck*, 130 S. Ct. at 1794. Relying on that traditional understanding, the Court in *Merck* interpreted the statutory term "discovery" to extend beyond actual discovery, and to encompass "facts that a reasonably diligent plaintiff would have discovered." *Id.* at 1793. The Court specifically rejected the argument that "determining when a hypothetical reasonably diligent plaintiff would have 'discover[ed]' the necessary facts is too complicated for judges to undertake," explaining that "courts applying the traditional discovery rule have long had to ask what a reasonably diligent plaintiff would have known and done in myriad circumstances." *Id.* at 1798.[4]

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[4] The government has previously taken the position in this Court that Section 16(b)'s two-year limitations period is subject to a discovery rule, so that "a cause of action does not accrue until the plaintiff discovers, or reasonably should have discovered, the facts that form the basis for the action." Brief for the United States as Amicus Curiae at 7,

As respondent emphasizes (Br. in Opp. 25), Sections 16(a) and (b) are designed to operate together: the two provisions cover the same class of insiders, and Section 16(a)'s disclosure requirement serves in large part to bring to light the short-swing transactions covered by Section 16(b). See pp. 17-18, *supra*. Contrary to respondent's contention (*id.* at 25-26), however, allowing Section 16(b)'s limitations period to be triggered by public disclosures other than Section 16(a) statements would not sever the connection between the two provisions. Section 16(a)'s disclosure requirement is integral to the proper application of Section 16(b), since it is by virtue of that requirement that *non*-disclosure may properly be treated as a form of wrongful concealment. The two provisions may thus be read as a coherent whole without taking the further (and unwarranted) step of treating Section 16(a) statements as the *only* means by which shareholders may be placed on notice of insiders' short-swing transactions.

c. Petitioners argue (Br. 43-44) that this Court should reverse the judgment below because respon-

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Tristar Corp. v. *Freitas*, 521 U.S. 1118 (1997) (No. 96-577); see *id.* at 8 ("As applied to claims under Section 16(b), the discovery rule operates to ensure that the limitations period does not begin to run before a plaintiff discovers, or reasonably should have discovered, an insider's short-swing transactions."); *id.* at 10 ("[T]he date of accrual for a claim under Section 16(b) is the date on which the securities transactions were, or reasonably should have been, discovered."). The government's brief in *Tristar* suggested that adequate notice of an insider's short-swing transactions can be provided *only* by the filing of a Section 16(a) report. See *id.* at 11-12, 13 n.6. In *Tristar*, however, the defendant does not appear to have contended that security holders were on notice of the relevant short-swing transactions through other publicly available sources. This case squarely presents the question whether continued tolling is appropriate in that circumstance.

dent's complaints are based on information that was publicly available more than two years before the complaints were filed. As petitioners emphasize, there is substantial overlap between respondent's allegations and allegations in other complaints filed against petitioners under the securities and antitrust laws as early as 2001. See pp. 4-6, *supra*. The court of appeals, however, did not conduct the correct inquiry into when a reasonably diligent security holder would have discovered the information on which respondent's Section 16(b) claims are based. This Court has "recognize[d] the prudence, when faced with an 'equitable, often fact-intensive' inquiry, of allowing the lower courts 'to undertake it in the first instance.'" *Holland*, 130 S. Ct. at 2565 (quoting *Gonzalez* v. *Crosby*, 545 U.S. 524, 540 (2005) (Stevens, J., dissenting)). This Court therefore should vacate the judgment below and remand for the lower courts to determine when a reasonable security holder would have discovered the facts underlying respondent's claims.

C. Nothing In The Text Or Structure Of Section 16(b) Or Surrounding Provisions Is Sufficient To Overcome The Background Presumption That Equitable Tolling Applies

1. Petitioners contend that, by "its plain terms," Section 16(b) "is the classic formulation of a statute of repose" that "cannot be extended to account for a plaintiff's discovery of the facts underlying a claim." Br. 17; see Pet. 19 ("[T]olling is inconsistent with a 'straightforward textual reading' of Section 16(b).") (quoting Pet. App. 72a (M. Smith, J., specially concurring)). That is simply a refusal to accept that Section 16(b) establishes a limitations period on bringing disgorgement actions,

not a jurisdictional prerequisite to such actions. See pp. 9-11, *supra*. This Court has repeatedly recognized that statutes of limitations are generally "subject to rules of forfeiture and waiver" and "typically permit courts to toll the limitations period in light of special equitable considerations." *John R. Sand*, 552 U.S. at 133; see *Holland*, 130 S. Ct. at 2560; *Day*, 547 U.S. at 213 (Scalia, J., dissenting). That Section 16(b) does not explicitly authorize equitable tolling does not distinguish it from the other limitations periods which this Court has held subject to tolling. See, *e.g.*, *Delaware State College* v. *Ricks*, 449 U.S. 250, 256-259 (1980); *Exploration Co.*, 247 U.S. at 445-447.[5]

2. Petitioners rely (Br. 18-20 & n.3) on this Court's decisions in *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350 (1991) (*Lampf*), and *Merck*, *supra*, which held that *other* statutory time limits for commencing suit were not subject to equitable tolling. In each of those cases, however, this Court found sufficient textual or structural evidence that the provision at issue was a statute of repose. There is no such evidence in the text or structure of Section 16(b). Indeed, the text and structure of Section 16(b) are wholly different from the other statutory time limits that this Court has found not to be subject to equitable tolling.

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[5] Section 16(b)'s two-year deadline for filing suit likewise contains no express exception for cases in which the defendant fails to assert its limitations defense in a timely manner. The absence of such an express exception, however, does not cast doubt on the inference that Section 16(b)'s deadline (like statutes of limitations generally) "is subject to rules of forfeiture and waiver." *John R. Sand*, 552 U.S. at 133. Similarly with respect to equitable tolling, the crucial question is not whether tolling is explicitly authorized, but whether Congress has clearly displaced the usual rule that tolling is available.

In *Lampf*, this Court addressed the operation of a time limit in the 1934 Act, 15 U.S.C. 78i(e), for actions related to the willful manipulation of securities prices. 501 U.S. at 359-360 & n.6. In *Merck*, the Court discussed the time limit in 28 U.S.C. 1658(b) for private securities-fraud actions under the 1934 Act. 130 S. Ct. at 1790. In both cases, the Court found that the relevant provisions serve in part as statutes of repose that set outer boundaries on the periods for bringing suit. See *Lampf*, 501 U.S. at 363; *Merck*, 130 S. Ct. at 1797. Petitioners maintain (Pet. 21) that there is no meaningful distinction between those provisions and Section 16(b).

Both *Lampf* and *Merck*, however, involved time limits with a two-part structure that combines an express discovery rule with an absolute period of repose. The provision at issue in *Lampf* states that "[n]o action shall be maintained * * * unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. 78i(e). The provision at issue in *Merck* states that an action "may be brought not later than the earlier of * * * 2 years after the discovery of the facts constituting the violation; or * * * 5 years after such violation." 28 U.S.C. 1658(b). Under each of those provisions, the requirement that suit be filed within a specified period after the violation was *in addition to* a separate requirement that suit be filed within a (shorter) defined period after "discovery" of the relevant facts. In light of the two-part structure of those provisions, the Court concluded that the three- and five-year periods could "have no significance in this context other than to impose an outside limit." *Lampf*, 501 U.S. at 363; see *Merck*, 130 S. Ct. at 1797.

Section 16(b) does not contain a similar dual structure, but simply establishes a single period during which suits may be brought to recover short-swing profits. The Court in *Lampf* acknowledged that "[t]ime requirements in lawsuits . . . are customarily subject to equitable tolling," 501 U.S. at 363 (quoting *Irwin*, 498 U.S. at 95), and it did not suggest that this presumption is generally inapplicable to limitations periods contained in the securities laws. It instead relied on a structural inference that is wholly inapposite here. *Lampf* and *Merck* therefore provide no basis for declining to apply traditional background principles in determining whether Section 16(b) is subject to equitable tolling.[6]

In this respect, Section 16(b) is like Section 20A of the Securities Exchange Act, 15 U.S.C. 78t-1, which prohibits trading on the basis of material, nonpublic information, and which provides that "[n]o action may be brought under this section more than 5 years after the date of the last transaction that is the subject of the violation." That provision is not a "statute of repose," but an "ordinary statute of limitations" that is no "more potent than the usual variety." *Short* v. *Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1391 (7th Cir. 1990) (Easterbrook, J.), cert. denied, 501 U.S. 1250 (1991); see *id.* at 1392 (contrasting Section 20A with the dual-structure time limits found elsewhere in the securities laws). There is a good reason that Congress designed Sections 16(b) and 20A as statutes of limitations. Both statutes use "a measure of damages that the passage of time does not affect"—namely, the profits realized by the insider from the covered transaction. *Ibid.* Accordingly, the reasons for setting periods of repose with respect to other securities laws "are not present" with Section 16(b). *Ibid.*[7]

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[6] Petitioners observe (Br. 20-21) that the language of Section 16(b)'s two-year deadline is similar to the language that defined the outer limits for filing suit under the provisions at issue in *Lampf* and *Merck*. But this Court's conclusion that those outer limits defined absolute periods of repose was not based upon the language of those limits viewed in isolation; it was based instead on the evident function of those limits within the larger two-part provisions in which they appear. The structural evidence of Congress's intent that was critical to the Court's conclusion in both *Lampf* and *Merck* is wholly lacking here.

3. Petitioners also rely (Br. 25) on an earlier and unenacted version of Section 16(b) introduced in the House of Representatives, which provided that no suit to recover short-swing profits could "be brought more than six months after such profit was realized if the facts upon which such suit was based were disclosed by a statement filed pursuant to subsection (a), or more than three years after such profit was realized if the facts were not so disclosed." Staff of H. Comm. on Interstate and Foreign Commerce, 73d Cong., *Securities Exchange Bill: Showing the Changes made by Subcommittee in Committee Print of April 3,* 51 (Comm. Print 1934). This Court has declined, however, to attach significance to the absence from an enacted law of language previously contained in an unenacted bill, because "'mute intermediate legislative maneuvers' are not reli-

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[7] Petitioners also rely (Br. 24) on the Court's passing statement in *Lampf* that Section 16(b) "sets a 2-year rather than a 3-year statute of repose." 501 U.S. at 360 n.5; see *id.* at 375 (Kennedy, J., dissenting) (referring to Section 16(b) as "a 2-year statute of repose"). Section 16(b) was not at issue in *Lampf,* and this Court is "not bound to follow [its] dicta in a prior case in which the point now at issue was not fully debated." *Central Va. Cmty. Coll.* v. *Katz*, 546 U.S. 356, 363 (2006). That is particularly so because, as explained in the text, *Lampf*'s overall reasoning provides no basis for treating Section 16(b) as anything other than an ordinary statute of limitations.

able indicators of congressional intent." *Mead Corp.* v. *Tilley*, 490 U.S. 714, 723 (1989) (quoting *Trailmobile Co.* v. *Whirls*, 331 U.S. 40, 61 (1947)).

In any event, the unenacted version of Section 16(b) merely confirms what the text of the enacted version makes clear: Congress did not "link the time limit for a Section 16(b) action to a Section 16(a) disclosure." Pet. Br. 25. Section 16(b)'s limitations period commences when an insider's short-swing transaction is disclosed to the public, either through the filing of a Section 16(a) report or through other means. Indeed, if anything, the earlier version of Section 16(b) only demonstrates that the House of Representatives rejected a two-part structure that would have combined an express discovery rule with an absolute period of repose. The House thus declined to adopt the sort of dual structure that is used elsewhere in the securities laws to create a period of repose. See pp. 26-27, *supra*.

4. Finally, petitioners argue (Br. 23-24) that the purposes of Section 16(b) support treating its time limit as a statute of repose rather than a statute of limitations. Petitioners correctly observe that "Section 16(b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation." Pet. 21 (quoting *Reliance Elec. Co.*, 404 U.S. at 422). "Given the strict-liability nature of Section 16(b)," petitioners contend, this Court should treat the statutory time limit as an absolute bar to suit after two years, thus relieving insiders from "the specter of liability hanging over [them] in perpetuity." Pet. 22.

Petitioners draw the wrong inference from Congress's imposition of strict liability. Section 16(b) "was intended to be thoroughgoing, to squeeze all possible profits out of stock transactions, and thus to establish a standard so high as to prevent any conflict between the selfish interest of a fiduciary officer, director, or stockholder and the faithful performance of that duty." *Smolowe* v. *Delendo Corp.*, 136 F.2d 231, 239 (2d Cir.), cert. denied, 320 U.S. 751 (1943). To permit the two-year period to run—even when an insider has failed to file a Section 16(a) report and when the short-swing transaction has not been disclosed through some other publicly available source—would defeat Section 16(b)'s core purpose. On petitioners' view, "insiders could insulate their transactions from the scrutiny of outside shareholders by failing to file Section 16(a) reports and waiting for the two year time limit to pass," thus effectively nullifying the very purpose of Section 16(b). *Whittaker*, 639 F.2d at 528.

Petitioners' interpretation also ignores the interplay between Sections 16(a) and 16(b). When an insider purchases or sells securities of the relevant issuer, he has two business days to file his Form 4 with the SEC. See 15 U.S.C. 78p(a)(2)(C); see also 15 U.S.C. 78p(a) (2000) (previous reporting period of "within ten days after the close of [the] calendar month" in which the relevant security was purchased or sold). Section 16(b) then requires that a suit to recover short-swing profits be filed within two years after the profits were realized. Congress may sometimes adopt particular limitations periods to accommodate the likelihood that a plaintiff's investigation into the relevant facts will require a significant expenditure of time. The two-year limitations period at issue here, however, cannot plausibly be thought to reflect that expectation. So long as an insider complies with Section 16(a), a Section 16(b) plaintiff has virtually two years (two years minus two business days) to file suit *after* the relevant transaction has been disclosed in a publicly available manner.

Under petitioners' theory, an insider's failure to file a Section 16(a) statement would often effectively preclude the filing of a Section 16(b) suit, because security holders would frequently have no alternative means of discovering the transaction before the two-year limitations period expired. But even in cases where a short-swing transaction is publicly disclosed through other means less than two years after it occurs, such information will virtually always enter the public domain after the two-day period for filing a Section 16(a) report. Thus, in cases where insiders breach their Section 16(a) obligations, petitioners' approach would routinely leave security holders with significantly less time than Congress intended in which to bring a Section 16(b) action. That is a classic example of defendants' benefitting from their own wrongful concealment—one that this Court need not and should not countenance. See *Reliance Elec. Co.*, 404 U.S. at 424 ("[W]here alternative constructions of the terms of Section 16(b) are possible, those terms are to be given the construction that best serves the congressional purpose of curbing short-swing speculation by corporate insiders.").

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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AUGUST 2011

AMICUS
CURIAE
BRIEF

No. 10-1261

In The
Supreme Court of the United States

◆

CREDIT SUISSE SECURITIES
(USA) LLC, ET AL., PETITIONERS,

v.

VANESSA SIMMONDS

◆

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

◆

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

◆

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BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS AMICI CURIAE SUPPORTING PETITIONERS

The Chamber of Commerce of the United States of America and Securities Industry and Financial Markets Association respectfully submit this brief as amici curiae in support of petitioners.[1]

INTEREST OF AMICI CURIAE

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in—or itself initiates—cases that raise issues of vital concern to the Nation's business community.

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[1] Documents reflecting the parties' consent to the filing of this brief have been submitted to the Clerk. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association. SIFMA regularly files amicus curiae briefs in cases that raise legal issues of vital concern to the participants in the securities industry.

The Chamber, SIFMA, and their members recognize the importance of the federal securities laws to deter and remedy wrongdoing. But the Ninth Circuit's holding in this case effectively eliminates an otherwise valid defense in securities actions under Section 16(b) of the Securities Exchange Act of 1934. Amici and their members are concerned that the broad tolling rules articulated by the courts of appeals in cases involving purported non-compliance with the reporting requirements of Section 16(a) will undermine the repose that is one of the goals of our federal securities laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

In Section 16(b) of the Securities Exchange Act of 1934, Congress authorized civil actions by an issuer corporation or "by the owner of any security of the issuer in the name and in behalf of the issuer" to recover profits from certain covered purchases and sales of the corporation's securities within a six-month period. 15 U.S.C. § 78p(b). Congress also provided that "no such suit shall be brought more than two years after the date such profit was realized." *Ibid.*

The language of the statute is clear—nothing in the text indicates that the limitations period runs from anything other than the time of the violation, i.e., when the "profit was realized." When Congress wanted a limitations period to run from the "discovery" of a violation in the Securities Exchange Act, it said so expressly. The Ninth Circuit erred in ignoring that the plain language establishes a period of repose, as this Court observed in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991).

Instead, based on its own policy judgment, the court below (as have other lower courts) adopted its own tolling rule for the express cause of action in Section 16(b). But as interpreted by the court of appeals, the limitations period of Section 16(b) offers no repose at all. Indeed, respondent acknowledged below that the Ninth Circuit's rule allows a plaintiff with actual knowledge of a Section 16(b) violation to wait decades before filing suit, so long as the defendant has not filed a purportedly required report with the Securities and Exchange Commission (SEC) under Section 16(a). Nothing in the statute's text supports such a scheme, and Congress could not possibly have wanted it.

To the contrary, Congress deliberately designed the limitations periods of the Act to lessen the possibility of lingering litigation. Congress consistently used discovery rules to shorten limitations periods, not extend them. Congress did so to give potential defendants greater repose, even in situations, unlike here, where the alleged violation involves intentional, fraudulent, wrongdoing. If, as this Court observed in *Lampf*, Congress did not intend plaintiffs to be able to rely on tolling with regard to causes of action involving intentional misconduct, there is no reason to believe Congress would have wanted tolling for the cause of action in Section 16(b), which imposes strict liability.

The Ninth Circuit's misreading of the statute is particularly problematic because virtually all of the litigation under Section 16(b) is driven by attorneys' fees, not by harm to any plaintiff. Because any profits recovered in the litigation (minus attorneys' fees) go to the corporation itself, the named plaintiffs have almost no personal stake in the litigation. The fact that respondent is related to one of the lawyers and obtained the shares at his direction is also not uncommon in Section 16(b) litigation. In these circumstances, any form of tolling is particularly unwarranted.

Finally, even if a tolling rule were going to be grafted onto the plain language of the statute, respondent's suit is untimely under either the doctrine of "discovery accrual" or under "equitable tolling." Both are based on what a plaintiff knows or should have known after due diligence. Respondent cannot dispute that she should have known of the purported profit of which she now complains many years before she filed suit, and indeed many years before she obtained the securities. Indeed, she relies on the same facts that were alleged in a complaint filed six years before hers.

ARGUMENT

I. CONGRESS EXPRESSLY ENACTED A STRICT TWO-YEAR STATUTE OF REPOSE

The Ninth Circuit adopted a tolling rule for the express limitations period in Section 16(b) of the Securities Exchange Act of 1934 that is inconsistent with the text and purpose of Section 16 and the Act as a whole.

By its terms, the statute reflects that the two-year limitations period is an absolute outside limit on bringing suit. That conclusion is confirmed by its legislative backdrop. Thus, as this Court stated after an extensive survey of the 1934 Act, Section 16(b) was intended to establish a "period of repose" and, like the other limitations in the Act, it is not subject to any form of tolling. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360 & n.5 (1991). At the very least, Congress did not intend courts to graft onto it the unprecedented tolling rule adopted by the Ninth Circuit, or any variant thereof.

A. Section 16(b)'s Text And Purpose Demonstrate That Congress Imposed A Strict Two-Year Statute Of Repose

1. The plain language of Section 16(b) shows Congress intended to prohibit suits brought outside the two-year period provided in the statute.

Section 16(b) provides that "any profits realized" by certain statutorily-defined covered persons from the purchase and sale, or sale and purchase, of any equity securities occurring within a six-month period would "inure to and be recoverable by" the issuer corporation. 15 U.S.C. § 78p(b). Congress authorized civil actions against those persons "instituted * * * by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit." *Ibid.* But in the same sentence, Congress provided that "no such suit shall be brought more than two years after the date such profit was realized." *Ibid.*

Congress readily could have adopted a different scheme. It could have made the limitations period commence on the date that the transaction was reported under the disclosure requirements of Section 16(a). Or Congress could have made the date run from when the company knew of or should have discovered the purchase or sale; or the date the company knew of or should have discovered the realized profit. Congress did not. Instead, Congress made clear that the limitations period runs from the time the violation was completed, i.e., "after the date such profit was realized." 15 U.S.C. § 78p(b). That should be the end of the matter.

Tying a limitations period to a wrongful act (as opposed to the plaintiff's injury) is typical when Congress intends the period to be one of repose, not subject to tolling. "A statute of repose differs from a statute of limitations in the former's legislatively specified time for commencement of the limitation period (frequently the time of the occurrence of the legal wrong)." 1 Calvin W. Corman, *Limitations of Actions* § 6.1, at 371 (1991).

Furthermore, Congress created the cause of action and the limitations period in the same sentence. That suggests Congress intended to treat the limitations period as an integral part of the cause of action itself, and not simply a limit on the remedy. That close textual link also shows that Congress did not intend the limitations period to be subject to tolling. *See Davis v. Mills*, 194 U.S. 451, 454 (1904) ("the fact that the limitation is contained in the same section" is "a ground for saying that the limitation goes to the right created").

2. Reading Section 16(b)'s plain language as a statute of repose is consistent not only with fundamental rules of statutory construction applicable to all statutes, but also makes sense given the nature of Section 16(b).

Section 16(b) is a prophylactic rule. Section 16(b)'s rule about when profits inure to a corporation is both over- and under-inclusive in its effort to target trading on insider information. For example, Section 16(b) does not require proof of possession of any insider information. But it also does not apply to transactions outside the six-month period, even if a defendant did use insider information. This Court thus has recognized that Section 16(b) establishes a "'crude rule of thumb'" that serves as a "prophylactic rule with respect to insider, short-swing trading." *Foremost-McKesson, Inc. v. Provident Sec. Co.*, 423 U.S. 232, 251 & n.26 (1976) (quoting *Stock Exchange Practices: Hearings Before the Senate Comm. on Banking & Currency*, 73d Cong. 6556-6557 (1934) (testimony of Thomas G. Corcoran)).

Section 16(b) also imposes "a general rule of strict liability." *Gollust v. Mendell*, 501 U.S. 115, 116-117 (1991); *see also Foremost-McKesson*, 423 U.S. at 251 ("this statute imposes liability without fault within its narrowly drawn limits"). It deprives the covered person of his short-swing profits, regardless of his intent or actual possession of inside information. *See Kern Cnty. Land Co. v. Occidental Petroleum Corp.*, 411 U.S. 582, 592-593 & n.23 (1973).

Thus, to the extent there is ambiguity, it is "inappropriate to reach the harsh result of imposing § 16(b)'s liability without fault." *Foremost-McKesson*, 423 U.S. at 252.

Furthermore, Congress's treatment of defendants accused of intentional misconduct in the Securities Exchange Act provides a useful indication of how Congress intended to treat those accused of this strict liability provision. In *Lampf*, this Court held that Congress intended to enact statutes of repose (i.e., limitations periods not subject to equitable tolling) for the Act's other express causes of action in Sections 9 and 18. 501 U.S. at 361-362. Those sections deal with intentional, often fraudulent, wrongdoing. There is nothing to suggest (much less show) that Congress intended to deny such repose to defendants who may have breached a strict liability provision.

Where, as here, the text and purpose demonstrate that Congress did not intend a particular time limit to be extended, this Court cannot give such extensions through application of background rules. *See* Horace G. Wood, *A Treatise on the Limitation of Actions at Law and in Equity*, § 274, at 588 (1882) ("when the courts engraft upon these statutes [of limitations] exceptions which the statute does not make or warrant, its action is nothing more nor less than an assumption of legislative functions"). Indeed, *Lampf* squarely rejected the suggestion that the outer limit of the limitations periods of the Securities Exchange Act was subject to equitable tolling for precisely this reason. *See* 501 U.S. at 363.

B. Other Limitations Periods In The Securities Exchange Act, As Well As The Act's Legislative Backdrop, Confirm That Congress Provided A Strict Statute Of Repose For Section 16(b)

1. This plain language reading of Section 16(b) is bolstered by the text and history of the limitations provisions for the other express causes of action in the same Act. *See Lampf*, 501 U.S. at 359. The Securities Exchange Act contained three express causes of action with limitations periods: the provisions that are now Sections 9(f), 16(b), and 18(c). Ch. 404, tit. I, §§ 9(e), 16(b), 18(c), 48 Stat. 881, 890-891, 896, 898 (codified as amended at 15 U.S.C. §§ 78i(f), 78p(b), 78r(c)). The Act also shortened the limitations period in Section 13 of the Securities Act of 1933 for the express causes of action created by that statute. *See id.* tit. II, § 207, 48 Stat. 908 (codified as amended at 15 U.S.C. § 77m).

These provisions demonstrate that when Congress intended a limitations period to run from the discovery of a violation, it said so. Sections 9 and 18 of the Securities Exchange Act both expressly identify the role discovery is to play in determining the limitations period. For example, Section 9(f) provides that "[n]o action shall be maintained to enforce any liability created under this section, unless brought within one year after the discovery of the facts constituting the violation and within three years after such violation." 15 U.S.C. § 78i(f); *see also* 15 U.S.C. § 78r(c) (Section 18(c)). Notably, in direct contrast to the ruling below, Congress used the discovery rules in each provision to ***shorten***, not extend, the limitations period. Furthermore, in each provision, Congress established an outside time period that could not be breached, even absent discovery. *See Lampf*, 501 U.S. at 362. In light of these reticulated limitations periods, a discovery rule should not be grafted onto Section 16(b)'s plain language. Nor should it be read, as respondent would do, to have no outside time limit.

2. The legislative debates surrounding these limitations periods confirm that Congress deliberately decided not to toll the limitations periods indefinitely until discovery. To be sure, the debates did not address the particular time limitation in Section 16(b), which was not added until very late in the legislative process. But the debates reflect Congress's understanding that absent an express provision regarding discovery or tolling, the time limitations prescribed in the Act were absolute.

a. The drafting history shows that Congress rejected efforts to tie the running of the limitations periods exclusively to discovery of the violation. An early proposal would have provided that, for violations of Sections 9 and 18, no action could be brought except "within two years after *the discovery* of the violation upon which it is based." *Stock Exchange Practices: Hearings Before the Senate Comm. on Banking & Currency*, 73d Cong. 6427, 6431 (1934) (emphasis added). Senator Kean objected that "[t]wo years after [the violation] would be all right, but 2 years after discovery means nothing but blackmail." *Id.* at 6565. The Senator was concerned that plaintiffs would start searching for the violations only after the value of the stock had decreased "and years afterwards there is a liability that carries to your grandchildren and great-grandchildren." *Ibid.*

Ultimately, the Senate Committee reported out a bill that extended the outer time limit to six years after the violation, but also imposed an additional inner-limit by requiring filing the action within two years of discovery of the facts constituting the violation. S. Rep. No. 73-792, at 18, 21 (1934). This approach was ultimately accepted by the Senate after a debate that addressed two points.

First, the Senators who spoke all agreed that, as the text itself provided, the proposed six-year outside limit was absolute. *See* 78 Cong. Rec. 8198 (1934) (Sen. King) ("Suppose a person against whom a fraud was committed did not discover it until 6 years and 1 day; then no action would lie."); *ibid.* (Sen. Barkley) ("If a man makes no discovery of fraud within the time limit of the statute then he cannot sue at all."); *id.* at 8200 (Sen. Barkley) ("the [6]-year limitation fixes the ultimate period of limitation when he can bring suit"). Thus, absent an express reference to the discovery rule, it was understood that the limitations period would necessarily run from the violation. *Id.* at 8199 (Sen. Barkley). ("If we should strike out [reference to the discovery of the violation] we would have a straight period of 6 years in which anybody damaged could bring suit.").

Second, Senators explained the benefit of short, fixed limitations periods. They were concerned that long statutes of limitations "would deter men from serving on boards of directors, because the man might die and his estate would be liable, possibly 8 years after his death." *Id.* at 8200 (Sen. Byrnes); *see also id.* at 10,186 (Sen. Byrnes) (referring to concern that an estate might not be settled for several years if the decedent had been a director absent a short limitations period); *id.* at 8198 (Sen. Fletcher) ("[T]he person who made the misrepresentation or false statement ought to feel safe at some reasonable time that he will not be disturbed."). Thus, the Senate shortened the time periods proposed by the committee by one year and reduced the time periods already in the 1933 Act by several years. *Id.* at 8201-8202.

b. The Conference Committee (and then both houses of Congress) combined the most restrictive elements of each body's limitations provisions for Sections 9 and 18.

The Conference Committee reduced the outer time limit to three years from the violation, as provided in the House bill, rather than the longer period adopted by the Senate. *See* H.R. Rep. No. 73-1838, at 32, 36 (1934) (Conf. Rep.). But it also kept the Senate's requirement that, in addition, a plaintiff had to file the suit within one year of discovering the violation. *Ibid.*

With regard to Section 16, the Conference Committee accepted the Section 16(b) cause of action (which had been adopted by the Senate but not the House). *Id.* at 36. But it added a two-year limitations period running from "the date the profit was realized."

This drafting history shows that when Congress wanted the discovery of a violation to trigger a limitations period, it said so explicitly. And when it employed such discovery rules, they shortened the period of time to bring suit rather than extended it. Moreover, as the legislation evolved, Congress repeatedly reduced the time periods themselves to give potential defendants greater repose. Indeed, in each instance where Congress made changes to the Act, "the period finally selected [by Congress] attaches more significance to a policy of repose than to protecting investors" from undiscovered violations. Harold S. Bloomenthal, *The Statute of Limitations and Rule 10b-5 Claims*, 60 U. Colo. L. Rev. 235, 262 (1989); *see also* 78 Cong. Rec. 10,186 (1934) (Sen. Byrnes) ("[T]he amendments adopted today give greater assurance to the honest officials of a corporation."). This Court should not read in tolling rules that Congress did not adopt.

3. Congress's intent was confirmed when, after *Lampf*, it addressed the limitations period for the implied causes of action in the Securities Exchange Act. As this Court recounted in *Merck & Co. v. Reynolds*, in enacting an express limitations period for Section 10(b), Congress "repeated *Lampf*'s critical language" in the Sarbanes-Oxley Act, except to extend the outside period of repose from three years to five years.

130 S. Ct. 1784, 1795 (2010) (citing Pub. L. No. 107-204, 116 Stat. 745, 801 (2002) (codified at 28 U.S.C. § 1658(b)).

When Congress was thus revisiting the Act's limitations periods, it could have altered the limitations period in Section 16(b) to overcome this Court's description of it as a repose provision. It did not. Instead, it retained and built on the statutes of repose this Court recognized in *Lampf*.

II. EVEN IF CONGRESS HAD NOT PRECLUDED ANY EXTENSIONS, NO TOLLING WOULD BE WARRANTED IN THIS CASE

Even if some tolling rule were appropriate for Section 16(b) actions, the Ninth Circuit adopted a rule that is inconsistent with traditional tolling rules and should be rejected. Its rule would burden amici's members, by forcing them to choose between making disclosures they do not in good faith believe are appropriate or being indefinitely subject to Section 16(b) claims with no limitations period.

A. The Ninth Circuit's Tolling Rule Is Based On An Erroneous Understanding Of The Relationship Between Section 16(a) And Section 16(b)

1. In *Whittaker v. Whittaker Corp.*, the Ninth Circuit adopted a tolling rule that tied the limitations period of Section 16(b) to filing of a disclosure form pursuant to Section 16(a). 639 F.2d 516 (9th Cir.), cert. denied, 454 U.S. 1031 (1981). Section 16(a) requires certain covered persons initially to report to

the SEC "the amount of all equity securities of such issuer" of which they are the beneficial owner and then promptly to report "any such changes in such ownership." 15 U.S.C. § 78p(a)(1), (a)(3).

In linking the limitations period of Section 16(b) to compliance with Section 16(a), the Ninth Circuit has allowed Section 16(b)'s limitations period to be extended indefinitely, regardless of when the profit was realized or when a plaintiff should have known of the profit. According to the Ninth Circuit, the two-year time limit for bringing a Section 16(b) action "begins to run" only when the defendant discloses the relevant purchases or sales of securities in a filing with the SEC under Section 16(a). *Whittaker*, 639 F.2d at 527-530.

As respondent acknowledged (Pet. App. 110a), the result of the court of appeals' approach is that petitioners will never be able to invoke the limitations defense unless (1) they can prevail on the merits of their claim that they are not covered persons who are subject to Section 16(a), in which case the limitations issue becomes pointless; or (2) they file reports with the SEC that they do not believe they are required to file. Neither option is sensible or within the equitable traditions underlying tolling.

The Second Circuit has adopted an only-slightly-less-expansive approach. *See Litzler v. CC Invs., L.D.C.*, 362 F.3d 203 (2d Cir. 2004). Under its approach, "tolling is triggered by noncompliance with the disclosure requirements of Section 16(a)," but such tolling continues only until "the claimant or (depending on the circumstances) the company gets actual notice that a person subject to Section 16(a) has realized specific short-swing profits that are worth pursuing." *Id.* at 208. For the reasons below, both the Ninth and Second Circuit's approaches should be rejected.

2. Sections 16(a) and 16(b) each have distinct domains. One is a disclosure provision regarding all changes in ownership and one is a provision regulating the profits from short-swing trades. They can each co-exist apart from the other. The disclosures required by Section 16(a) are neither necessary nor sufficient to determine whether a covered person's profits should inure to the corporation under Section 16(b). "[M]any reports are required by section 16(a) of transactions which are not subject to section 16(b) liability." SEC Release No. 34-4801 (Feb. 20, 1953), reprinted in 18 Fed. Reg. 1131, 1131 (Feb. 27, 1953). Thus, the provisions' own terms provide no basis for holding, as the court of appeals did, that the time to file an action under Section 16(b) should be automatically tolled by the absence of a report under Section 16(a).

Even when a Section 16(a) report involves a transaction relevant to Section 16(b), nothing in Section 16(a) requires a covered person to report "profits realized," which is the trigger for the Section 16(b) limitations period. Indeed, Section 16(a) itself contains no requirement that the report submitted by the covered person address the price of the securities purchased or sold. It requires certain covered persons to report only "changes" in their ownership of equity securities. Although the current "Form 4" promulgated by the SEC requires listing the "price" of the securities (Br. in Opp. App. A, at 1b), that is simply an administrative happenstance that could change at any time.

Nor does the filing of the Section 16(a) report provide an exclusive source of evidence that establishes a violation. A defendant sued under Section 16(b) is not bound by the statements made in his Section 16(a) reports. *See Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 129 (2d Cir. 2001); *Chemical Fund v. Xerox Corp.*, 377 F.2d 107, 112 (2d Cir. 1967); Peter J. Romeo & Alan L. Dye, *The Section 16 Deskbook* § III.G.3, at 511 (Spring 2011). Likewise, as in this case, a plaintiff may learn all of the facts relating to a purported violation without any Section 16(a) report being filed. Thus, as a practical matter, there is no reason that the Section 16(b) cause of action should be contingent on the filing of a Section 16(a) report.

3. Nor would it be appropriate to toll Section 16(b) actions to encourage compliance with Section 16(a). Congress vested the federal government with exclusive authority to enforce Section 16(a). *See Scientex Corp. v. Kay*, 689 F.2d 879 (9th Cir. 1982) (no private right of action to enforce Section 16(a)).

Congress provided several express mechanisms for the SEC to assure compliance with Section 16(a).

The SEC can, and does, institute injunctive proceedings in federal district court to compel covered persons to file Section 16(a) reports. *See* Romeo & Dye, *supra*, § II.C.1.a(2), at 19-20 (collecting examples); Donald C. Cook & Myer Feldman, *Insider Trading Under the Securities Exchange Act*, 66 Harv. L. Rev. 385, 407 (1953) (article authored by Chair of SEC and its Special Counsel noting instances where such actions had been brought). The SEC also can, and does, initiate disciplinary proceedings against securities professionals (i.e. brokers, attorneys and accountants who appear before the SEC) for their failure to comply with Section 16(a). *See* Romeo & Dye, *supra*, § II.C.1.b(2), at 26-27 (collecting examples).

In recent years (since obtaining the authority in 1990), the SEC has used cease-and-desist orders and substantial monetary penalties through administrative proceedings to compel compliance with Section 16(a). *See id.* § II.C.1.a(1)(B), at 16-17; *id.* § II.C.1.a(3)(A), at 21-23 (collecting examples). A willful violation of Section 16(a) can result in substantial criminal fines or imprisonment. *Id.* § II.C.1.c, at 28 (collecting examples but noting that criminal proceedings are "extremely rare").

B. The Existing Incentives For Attorneys To Locate Potential Violations Of Section 16(b) And Initiate Lawsuits Eliminate The Need For Any Extraordinary Tolling Rules

In addressing the appropriateness of tolling the limitations period for the Section 16(b) cause of action, the Court should not disregard the reality that lawsuits under Section 16(b) are driven primarily by attorneys' fees. This is because any profits recovered in a suit go to the corporation, not the named plaintiff. Thus, more than in other situations, the named plaintiff actually has no (or virtually no) economic interest in pursuing the lawsuit.

The primary economic incentive for locating potential violations and bringing suit is the implied non-statutory right to obtain attorneys' fees. That incentive has been particularly successful in generating Section 16(b) litigation. "[A]wards of generous attorneys' fees in these cases assure that every conceivable section 16(b) violation, no matter how remote or far-fetched, will be litigated." Robert W. Hamilton, *Convertible Securities and Section 16(b)*, 44 Tex. L. Rev. 1447, 1450 (1965-1966) (footnote omitted).

Today, the small group of attorneys bringing Section 16(b) actions have sophisticated methods of locating purported violations, targeting different types of defendants, and avoiding conflicting claims amongst themselves. *See* Romeo & Dye, *supra*, § III.C.3, at 412-414 (describing various groups of lawyers).

Even in earlier times, attorneys drove these actions, rather than any individual who had been harmed. Isadore Blau, the plaintiff in *Blau v. Lehman*, 368 U.S. 403 (1962), and dozens of other 16(b) cases, was the owner of a newsstand in the lobby of his attorney's building. *See* Michael H. Dessent, *Weapons to Fight Insider Trading in the 21st Century*, 33 Akron L. Rev. 481, 491 n.46 (1999-2000); Edward Lamb, *No Lamb for Slaughter* 229 (1963); *see also* S.S. Samuelson, *The Prevention of Insider Trading*, 25 Harv. J. on Legis. 511, 522 n.55 (1988) (collecting some of the cases filed on behalf of Mr. Blau).

Similarly, the fact that respondent in this case is the daughter of one of the lawyers and obtained the shares at his direction (Pet. App. 107a-108a) is not uncommon in Section 16(b) litigation. *See* Dessent, *supra*, at 502 ("it has become a widespread practice of attorneys * * * to ask friends or family to purchase securities of the corporation in order to obtain standing and have the attorney provide their legal services").

While such conduct may not be improper, it does show that this specialized plaintiffs' bar has all the incentives and resources needed to detect and pursue legitimate claims under Section 16(b). The traditional rules governing tolling need not be distorted in order to provide further support for these actions.

C. Respondent's Claim Would Not Be Tolled Under Traditional Tolling Rules

As petitioners explain (Pet. Br. 27-29), this Court has recognized only two forms of tolling that might possibly apply in this situation. Neither, however, would assist respondent in avoiding the two-year limitations period because, even if applicable, both bar a claim once a plaintiff knew or should have known of the violation. And respondent cannot dispute that she should have known of the purported Section 16(b) violation several years before she filed her complaint.

First, the "discovery accrual" doctrine provides that a claim does not accrue "where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part." *Merck*, 130 S. Ct. at 1794 (quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946)). Even assuming Section 16(b) is analogous to a fraud claim, which is doubtful, that tolling doctrine would not benefit respondent. For more than a century, "courts have understood that 'fraud is deemed to be discovered . . . when, in the exercise of reasonable diligence, it could have been discovered.'" *Ibid.* (citation omitted). And discovery is not limited to the particular plaintiff's actual discovery, "but also to the facts that a reasonably diligent plaintiff would have discovered." *Id.* at 1793. Failure to engage in reasonable diligence to discover the violation results in forfeiture of the discovery rule's benefits. *Cf. Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194 (1997) (concluding for civil

RICO statute of limitations that "'reasonable diligence' does matter, and a plaintiff who is not reasonably diligent may not assert 'fraudulent concealment'").

Second, the doctrine of "equitable tolling" permits a statute of limitations to be tolled "only if [the plaintiff] shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). Such diligence is likewise assessed by what a plaintiff knew or should have known based on reasonable diligence. *See, e.g., Iavorski v. INS*, 232 F.3d 124, 134 (2d Cir. 2000) (Sotomayor, J.); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (Posner, J.), cert. denied, 501 U.S. 1261 (1991); *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 930-931 (5th Cir. 1975) (Wisdom, J.).[2]

Respondent should have known of the purported profit many years before she filed suit, and indeed many years before she obtained the securities. Indeed, she relies on the same facts that were alleged in a complaint filed six years before hers. Pet. App. 85a. Her complaint is thus barred under either of these tolling doctrines.

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[2] The Second Circuit's special tolling rule for Section 16(b)—which holds that tolling abates only when actual notice is established, *see Litzler*, 362 F.3d at 208—is contrary to the settled rule and should be rejected.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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